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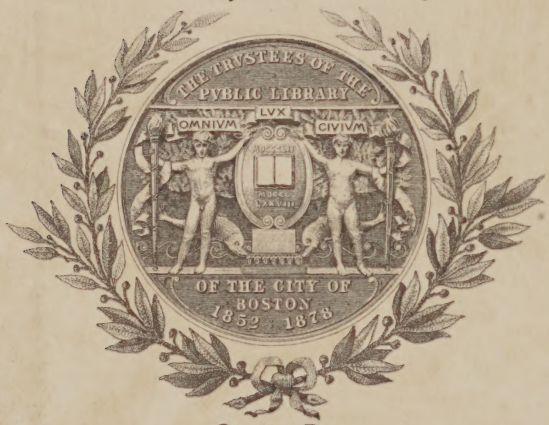

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MAINE LIQUOR LAW.

REPORT

OF THE CASE

WILLIAM H. GREENE,

VS.

NATHAN M. BRIGGS, ET AL.

7583.171

THE

PLAINTIFF'S OPENING ARGUMENT,

AND THE

OPINION OF THE U. S. CIRCUIT COURT

FOR THE

RHODE-ISLAND DISTRICT.

BY JOSEPH S. PITMAN,

COUNSELLOR AT LAW.

BOSTON:
LITTLE, BROWN & CO.
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J

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REPORT OF THE CASE

WILLIAM H. GREENE, *vs.* NATHAN M. BRIGGS, ET AL.

At the November Term, A. D., 1852, *of the U. S. Circuit Court for the Rhode-Island District.*

—BEFORE—

HON. BENJAMIN R. CURTIS,
Associate Justice of United States Supreme Court.
HON. JOHN PITMAN,
United States District Judge.

T. A. JENCKES, ESQ., SAMUEL AMES, ESQ., T. F. CARPENTER, ESQ., for Plaintiff. | JAMES M. CLARKE, ESQ., for Defendants.

THIS was an action of Replevin brought at said Term by the Plaintiff in the usual form, viz :

RHODE-ISLAND DISTRICT, *sc.*

UNITED STATES OF AMERICA.

[L. S.] *To the Marshal of said District, or to his Deputy, GREETING.*

We command you that you replevy, if to be found within your precinct, the goods and chattels following, viz : (*Here follows the description of the Liquors to be replevied.*) all of the value of six hundred dollars, belonging to William H. Greene, of the City, County and State of New-York, and a citizen of the State of New-York, now taken, detained or attached, by Nathan M Briggs and William H. Hudson, of Providence, in the County of Providence, in said Rhode-Island District, and both citizens of the State of Rhode-Island, &c., at Providence, in the County of Providence, and them deliver, &c. &c.

And summon the said Briggs and Hudson, that they appear before our next Circuit Court, next to be holden at Providence, within and for the Rhode-Island District, on the 15th day of November next, to answer unto, &c. &c.

The Writ concludes in the usual form, and bears date, as do also the Replevin Bond, and the Marshal's return of service on the 27th day of September, 1852.

The Defendant in answer thereto, filed the following plea:

And the said Defendants come and defend the force and injury when, &c. and well avow the taking of the goods and chattels in the declaration aforesaid above mentioned, in the said place in which, &c. and the detention thereof, &c., and justly, &c., because they say that the said Nathan M. Briggs now is a Police Constable of the city of Providence, in said District, and for a long time before, viz: ever since the 25th day of February, A. D. 1852, was a Police Constable as aforesaid, and that on the third day of September, A. D. 1852, at said Providence, Daniel K. Chaffee, George W. Wightman and Warren G. Slack, all then and there voters in said Providence, did, before Samuel W. Peckham, Esq., then and there one of the Justices of the Court of Magistrates of said Providence, make complaint under oath in writing in the words and figures following, to wit:

See the paper hereunto annexed marked A, which is hereby made a part of this plea.

Whereupon the said Samuel W. Peckham, Esq., Justice as aforesaid, did then and there issue a warrant of search in the words and figures following to wit:

See the paper hereunto annexed marked B, which is hereby made a part of this plea.

And that by virtue of said warrant the said Briggs did then and there proceed to search the premises described in said warrant, and did then and there seize the goods and chattels aforesaid, and did then and there convey them to some proper place of security, and that the said Briggs did then and there summon Moses K. Holbrook of said Providence as the owner or keeper of said goods and chattels, to appear at the next regular session of said Court of Magistrates, to be holden on the 4th day of September, A. D. 1852, at which time and place said Holbrook appeared.

And that the said Briggs, on the 4th day of September, A. D. 1852, at said Providence, did return said warrant to said Court of Magistrates with his doings thereon in the words and figures following, to wit: See the paper hereunto annexed marked C. which is hereby made a part of this plea; and that on the 7th day of September, A. D. 1852, at said Providence, said Holbrook appeared before said Court in person, and then and there made answer to said complaint in the words and figures following, to wit: See the paper hereunto annexed, marked D, which is hereby made a part of this plea.

And that the said Greene on said 7th day of September, 1852, at said Providence, made claim in writing before said Court to a portion of said goods and chattels, in the words and figures following, to wit: See the paper hereunto annexed, marked E, which is hereby made a part of this plea.

And that one Albert A. Hall of East Greenwich, in said District, on the ——— day of September, A. D. 1852, at said Providence, made claim in writing before said Court, to a portion of said goods and chattels in the words and figures following to wit: See the paper hereunto annexed marked F, which is hereby made a part of this plea; and that said two last mentioned claims were then and

there ruled out by said Court on the ground that said Court would take notice of no claim to said goods and chattels unless the claimant appeared in person.

That on said 7th day of September, A. D. 1852, at said Providence, and before proceeding to trial, the said complainants moved said Court of Magistrates then and there to amend said complaint by inserting the words "*then and there*" before the words "intended for sale," and also the words "to the complainants unknown" after the words "by a person," which motion was then and there opposed by said Holbrook, (who was then and there before said Court in person,) by his said attorney, Thomas A. Jenckes, Esq. and the said Holbrook then and there moved said Court by his said attorney, to quash said complaint, which said last mentioned motion was then and there dismissed by said Court, and said first mentioned motion was then and there granted by said Court and said amendment was then and there made by said Court—see said paper hereunto annexed marked A, with said amendment interlined, which is hereby made a part of this plea.

That on the 15th day of September A. D. 1852, at said Providence and subsequent to the introduction of said complainant's testimony by which it appeared that the store on Broad street was entered about five o'clock in the afternoon, the doors being open, and that the door of the Orange street store was broken open about seven o'clock in the evening of the third of September, 1852, and that the goods and chattels aforesaid were carried from both stores between nine and ten o'clock the same evening, said Holbrook, who was then and there present in person, moved said Court, by his said Attorney to quash said complaint, which said motion upon argument was on the 20th day of September, A. D. 1852, overruled by said Court.

That afterwards, to wit, on the 27th day of September, A. D., 1852, at said Providence, said Court, after hearing the pleadings, evidence and arguments of said parties, rendered judgment thereon in the words and figures following, to wit; see the paper hereunto annexed marked H. which is hereby made a part of this plea.

And that said Court thereupon, on the 27th day of September, A. D., 1852, at said Providence, delivered to said Briggs an order in the words and figures following, to wit; see the paper hereunto annexed, marked I. which is hereby made a part of this plea.

And this they are ready to verify. And so the said defendants well avow the taking and detention aforesaid, and pray judgment and a return of the same goods and chattels to be adjudged to them, and that the said Briggs may proceed and destroy said liquors in the presence of said Hudson, as ordered by said Court of Magistrates, and for their damages and costs. By their Attorney,

J. M. CLARKE.

(A.)

[COMPLAINT AND SEARCH-WARRANT.]

To Samuel W. Peckham, Esquire, one of the Justices of the Court of Magistrates in the city of Providence, in the County of Providence, in the State of Rhode-Island and Providence Plantations,

Daniel K. Chaffee, Warren G. Slack, and George W. Wightman, voters in the city of Providence. in said county, on oath complain in the name and behalf of the State, that they have reason to believe, and do believe, that at said Providence, on the third day of September, 1852, with force and arms, spirituous or intoxicating liquors are kept or deposited, and then and there intended for sale, by a person to the complainants unknown, who is not authorized to sell the same in said Providence, under the provisions of the act entitled "an act for the suppression of drinking houses and tippling shops," in the building number 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street; also the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira,) together with the cellars and yards belonging to said buildings, against the Statute and the peace and dignity of the State.

Wherefore they pray advice, and that process may issue, and that the said premises may be searched, and that the owner or keeper of said liquors may be summoned to answer to this complaint, and be further dealt with relative to the same, according to law.

Dated at Providence, this 3d day of September, A. D., 1852.

D. K. CHAFFEE,
GEO. W. WIGHTMAN,
WARREN G. SLACK.

PROVIDENCE, *sc.*

In Providence, this 3d day of September, A. D., 1852, personally came D. K. Chaffee, Geo. W. Wightman, and Warren G. Slack, subscribers to the above complaint, and made oath to the truth of the same. Before me,

SAMUEL W. PECKHAM,
Justice of the Court of Magistrates.

(B.)

STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS.

PROVIDENCE, *sc.*

To the Sheriff, his Deputy, or to either of the town Sergeants, or Constables in the County of Providence, *GREETING.*

[L. S.] Complaint having been made to me on oath, as above written, you are therefore hereby required, in the name of said State, forthwith to proceed to search the premises above described, to wit: the building number 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street;

also the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira,) and the cellars and yards belonging to said buildings, in the city of Providence, and if any such liquors are found therein, to seize the same and convey them to some proper place of security, and there keep them until final action is had thereon; and to summon the owner or keeper of said liquors (if he shall be known to you) to appear at the next regular session of the Court of Magistrates on the 4th day of September, 1852, at 8 o'clock, A. M., to show cause, if any he have, why said liquors should not be adjudged forfeited, and be destroyed, and he be adjudged to pay a fine of twenty dollars, to the use of the State, and all costs that shall accrue hereon. And for so doing, this shall be your warrant. Hereof fail not.

Given under my hand and seal, at Providence, in said County, this 3d day of September, in the year 1852.

SAMUEL W. PECKHAM.
Justice of the Court of Magistrates.

(C.)

PROVIDENCE, *sc.*, Sept. 3d, 1852.

I have taken aid and diligently searched the within described premises, and have found and seized the following described Liquors, viz: to wit, in the buildings number 81 Broad street, and the buildings in the rear thereof and connected therewith, running back to Middle street, the following described liquors, viz: *Here follows description of liquors.*

Also, the Liquors hereafter described in the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland, and Solomon Pareira,) as follows, viz: *Here follows description of liquors.*

And have summoned Moses K. Holbrook as the owner or keeper of said liquors, to appear before the Magistrates Court on the 4th day of September, 1852, at 8 o'clock, A. M.

NATHAN M. BRIGGS,
Police Constable.

On the 7th of September, (by paper referred to in plea marked D.) Moses K. Holbrook, of Providence, summoned by the officer who made service of the warrant, averred, before the Court of Magistrates that he held the liquors seized in the building on Broad st. as the agent of William H. Greene, of New-York, on storage, that no sale had been made, nor was any sale intended to be made, since the 19th of July last, and that he made no appearance as the owner, keeper or possessor of the other liquors.

On the same day, William H. Greene, of New-York, filed his claim in writing, (marked E.) in said Court, to said liquors, averring that they were deposited in said buildings on storage, before the 19th of

July, 1852, and that they were not kept or deposited for sale in the city of Providence contrary to the provisions of the act under which they were seized, and demanded that they be returned to him.

On the same day, A. A. Hall, of East Greenwich, filed his claim in writing (marked F.) in said Court, claiming one cask of native wine, making the same averment as that made by Greene, and demanded that said cask be returned to him.

On the 27th day of September, the Court of Magistrates entered the following decree:

(H.)

"Be it remembered, that on the 3d day of September, 1852, the following spirituous and intoxicating liquors, to wit; (*Here follows a description of the liquors,*) were seized upon a search warrant, issued by Samuel W. Peckham, one of the Justices of the Court of Magistrates, in the city of Providence, in said county, and one of the Justices of the Peace for said County, on the complaint of D. K. Chaffee, George W. Wightman, and Warren G. Slack, voters in said city, in writing, in the name and behalf of the State, setting forth that with force and arms, at said Providence, on the 3d day of September, 1852, &c. &c., (following the language of the Warrant.)

And Moses K. Holbrook, the person summoned by the officer as the owner or keeper of said liquors, personally appeared before said Court of Magistrates as the keeper of the liquors seized in store No. 81 Broad street; but not as the keeper of the other liquors seized on said warrant.

And now on this 27th day of September 1852, upon a trial of said complaint and warrant, and after a full hearing of the evidence adduced and arguments of council for the complainants and for said Holbrook, it is adjudged by said Court that the said Moses K. Holbrook, is the keeper of all said liquors, and that it not having been shown to the Court by "satisfactory proof that said liquors are of foreign production, that they have been imported under the laws of the United States, and in accordance therewith, that they are contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe," and it being the opinion of the Court that said liquors have been "kept and deposited for the purposes of sale, contrary to the provisions of said act," said liquors are adjudged forfeited and are ordered to be destroyed in the presence of William H. Hudson, who is appointed to witness the destruction thereof, but the said Moses K. Holbrook having withdrawn himself from this Court and the said act not providing any way for the Court to keep or bring him before them, the Court cannot impose upon him the fine provided therein.

On the same day the Court of Magistrates issued the following *order to destroy.*

(I.)

PROVIDENCE, *sc.*

[L. S.] *To the Sheriff, his Deputy, or to either of the town Sergeants or Constables in the County of Providence, GREETING.*

Whereas, the following described spirituous or intoxicating liquors, to wit; (*Here follows a description of the liquors*) have been seized on a warrrant of search issued by Samuel W. Peckham, one of the Justices of the Court of Magistrates in the city of Providence, on the complaint of Daniel K. Chaffee, George W. Wightman and Warren G. Slack, voters in said city of Providence, according to the provisions of the 11th section of an act entitled "an act for the suppression of drinking houses and tippling shops," in the building number 81 Broad street and the buildings in the rear thereof and connected therewith running back to Middle street, also the building connected therewith on Orange street (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira) together with the cellars and yards belonging to said buildings in said city of Providence. And whereas, Moses K. Holbrook, the owner or keeper of said liquors, seized as aforesaid, having been duly summoned to appear before said Court, has appeard before said Court and has failed to show by satisfactory proof to said Court that said liquors are of foreign production, that they have been imported under the laws of the United States, and in accordance therewith, that they are contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe and whereas in the opinion of said Court said liquors have been kept and deposited for the purpose of sale contrary to the provisions of said act, said liquors have been by said Court adjudged forfeited and ordered to be destroyed, in pursuance of the provisions of said act:

You are therefore hereby ordered to destroy said liquors in the presence of William H. Hudson, and for so doing this shall be your authority. Witness, Francis E. Hoppin, at said Providence, this 27th day of September, A. D. 1852.

CHARLES HART, *Clerk.*

The Plaintiff demurred to this plea as insufficient in law to authorize the taking of said goods and chattels by said defendants in the manner set forth in their plea, and the defendant joined in demurrer.*

* The case upon the complaint and warrant was heard, as appears from the plea, for several days before the Court of Magistrates of the city of Providence, previous to the commencement of this suit, The several points of Constitutional law relied upon by Thomas A, Jenckes, Esq. Counsel for Mr. Greene, were stated in that trial, but were not urged for the decision of that Court, as its jurisdiction was limited. The points upon the insufficiency of the complaint and warrant, were argued at length before that Court, and its decision asked in favor of the claimant of the property upon the ground that the Court had jurisdiction over the process as well as over the subject matter. The points there taken and argued, were substantially the same, as those taken in the trial of this case.

At the close of the trial of the case in the Court of Magistrates, after the decision was rendered, and before the judgment was carried into effect, the property was taken out of the possession of the Constables who had it in charge, by the Marshal of this District upon the writ of Replevin in this case.

Ames for the Plaintiff in support of the demurrer.

This is a writ of replevin in common form, alleging that the defendants took certain liquors belonging to the plaintiff, and have detained the same from him. The defendants in replevin avow the taking and detention, and in justification set forth, substantially, in their plea, that they were constables charged with the service of a warrant for the seizure of said liquors, which warrant they set out in their plea—that said warrant was issued by, and that certain proceedings were had thereon before, the Court of Magistrates of the city of Providence, under and in conformity to an act entitled "an act for the suppression of drinking houses and tippling shops" passed by the General Assembly of the State of Rhode-Island at its May Session, A. D. 1852, (commonly called "The Maine Law") and that they—the defendants—seized said liquors, and now detain them, by virtue of the direction of said warrant and the order of said Court before whom said proceedings have been had thereon, which proceedings in detail are also set out in the plea.

To this plea, or avowry, the plaintiff has filed a general demurrer, claiming, of course, that the plea does not contain matter which affords a justification in law for the caption and detention admitted by it.

The grounds upon which the plaintiff has demurred are of a two-fold character.

First. That the portion of the act under which the warrant was issued and proceedings thereon were had, is void, because in divers particulars in conflict with the constitution of this State; and

Second. That at all events, the warrant itself, if regarded as a mere warrant of search, and especially if regarded as process upon which final adjudication is to be had, is fatally defective in both constitutional and legal requisites, and is void.

Before calling the attention of your Honors to the particulars of these grounds, we invite it in the first instance, to the legal *status* here of the peculiar species of property to which the act and the proceedings of which we complain relate, and to the distinctive character of the process under which our property of this kind has been seized, detained and adjudged forfeited—and to the provisions of the act regulating the process and the proceedings thereon in their different stages.

As these form the basis of our argument, it is proper that they should be considered before proceeding to it.

That wine and strong liquors are, in a general sense, property, highly useful for many purposes, though like many other

kinds of property, capable of great abuse—that they have a market value ,and are constitutionally entitled to protection as property, no one can doubt, and it is not necessary by argument to maintain. Nor is it necessary to determine how far, and under what circumstances, and by what provisions, the General Assembly may, if it see fit, deprive these things of their character as property, and by what legislation strip them of constitutional protection, as such. It will be time enough to consider these questions when legislation in this direction shall have gone to a greater extent than it has yet done.

It is sufficient for our purpose now, that the act itself of which we complain recognizes wine and strong liquors as property in Rhode-Island—that by express provision it authorizes their manufacture and sale for medicinal and mechanical purposes by certain agents of the towns and cities of the State —that it expressly authorizes the manufacture of alcohol for exportation—and with unecessary care, considering that there is no prohibition of it, provides that it may be kept for use by chemists, artists, and manufacturers.

See the 2d, 8th and 13th sections of the act.

But because the law does not prohibit it, wine and strong liquors may be lawfully kept here for use, and used, by every person, in any manner, in any quantity and for any purpose, so that they be not sold, or kept for sale. Indeed, under the protection of the Constitution of the United States, as section 11th of the act recognizes, if of foreign production, and imported according to the laws of the United States, they may be here for sale and sold in the original packages in which lawfully imported—and under the protection of the same constitution, may, without doubt, be lawfully here on their transit from one of these states to another.

Looking in fine at what the law, in a general sense, permits with regard to this species of property, in comparison with what it prohibits, such property may be lawfully kept for use, and used, by any person, in any form or quantity, and for any purpose except sale ; and may be kept for sale, and sold, under certain circumstances, and in a certain form, by any person, and in any form and quantity, by certain persons.

Who can doubt then, that though an offence may be committed in Rhode-Island by the sale or even keeping for sale of such property, unless such sale or keeping for sale be specially authorized, yet that, in general, the legal *status* of wine or strong liquors here, is that of *property*, lawfully here, and entitled to legal protection as property, because protected by that highest law, the constitution. Every other kind of prop-

erty is succeptible of criminal use and sale, which is all that can be said of this; and this, as much as any other property is entitled to legal and constitutional protection.

The next matter to which, *in limine*, we desire to call the attention of the Court, is, the distinctive legal character of the process under which our goods were seized and detained—which will be found by an examination of sections 11th, 12th, and 13th, of the act in question.

The process, as directed by the 11th section, is a complaint and warrant in the name of the State, and is denominated in that section, "a warrant of search." The complaint must be made under oath or affirmation, by three voters of a town or city, to a Justice of the Peace or Court exercising the jurisdiction of a Justice of the Peace in that town or city, that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited for sale in some store, &c., in that town or city, and are intended by a person not authorized, for sale. Upon such complaint, the Justice or Court issues the "warrant of search" directed to the sheriff, &c., under which, he is to proceed to search the premises described in the warrant, and if any spirituous or intoxicating liquors are found therein, to seize and convey the same to some place of security. The officer is further ordered to summon the owner *or* keeper of the liquors seized, *if he be known* to that officer, to appear forthwith before the Justice, or, at the next regular session of the Court upon whose warrant the liquors have been seized.

This then is a *criminal* proceeding in form, in the name of the State—setting forth that an offence has probably been committed by a deposit of liquors with the intent of sale, and ordering search for and seizure of the property, the future criminal disposition of which is suspected—and so far resembles that well known criminal process, after which it is entitled in the act, "a warrant of search" for stolen goods. The difference observable is, that such a warrant requires the officer to arrest and bring before the magistrate the possessor of the stolen goods, whereas this merely requires the officer to *summon* or *notify* the owner, keeper or possessor, to appear, if he be *known to the officer*.

With the seizure of the suspected goods upon this warrant, all resemblance however between the proceedings upon it and the proceedings upon an ordinary warrant of search, ceases; for, with placing the stolen goods and the person found in the possession of them in the custody of the law—with the identification of the goods as those stolen—and a brief enquiry into

the connection of the possessor with them, as a mere basis for further process, all proceedings on a search warrant for stolen goods ends—the warrant itself is *functus officio*—the power of the magistrate or officer under the warrant, as to both person and goods seized, exhausted—and further and more certain process must be issued, other and more deliberate proceedings had before the property taken upon it, can be delivered over, even to its owner, or the person in possession of it, can, in any manner, be punished.

This warrant on the contrary, though it need name no person, nor charge the deposit with an unlawful intent upon anybody, except by the uncertain description of the owner *or* keeper, though it need not state when or where nor by whom this criminal intent was entertained—is the sole process upon which, whether the owner or keeper be notified or not, or appear or not, the Justice is to proceed to adjudge the property forfeited and to be destroyed, and if the owner or keeper, happening to be notified,and should presume to appear in its defence, is the sole process upon which the magistrate is to proceed to fine or imprison him. Nor is this all; for if the owner or keeper should be dissatisfied with the judgment of the magistrate, as he well might be with the judgment of a magistrate selected by the complainant, and should presume to appeal to the Court of Common Pleas, where alone he can by this act put the case before a jury, and should be able to pay and perform all the penalties and obligations which under the act constitute the conditions of his appeal, this loose and uncertain complaint and warrant of search is the sole process or accusation, upon which if found guilty of having liquors with intent to sell them, and the quantity of such liquors exceed five gallons, the owner or possesser is to be adjudged guilty of an offence neither charged nor insinuated in the warrant, against any body—to wit—that of being "*a common seller*,"—for which, in addition to the forfeiture and destruction of *his* property or the property in his charge, he is to be punished with a fine five times as great as that which could be inflicted below for the offence suggested in the process, or, in the alternative of its non-payment with costs, with imprisonment twice as long.

See sections 13 and 8 of the act.

Surely I am justified in saying, that this is a criminal prosecution in *form and substance*,—going to the forfeiture of property—the imposition of fines, the infliction of imprisonment; —fine too, looking to that in the appellate court, of no insignificant amount, imprisonment of no short duration and conducting as a first step, as will be seen by the act, to still

higher fine, and still longer imprisonment. I might go still farther and say, that looking at it in its various stages of form of process and service of process—of trial and punishment below, of appeal and trial and sentence and punishment above, it is a criminal prosecution of a most strange and unheard of character, which shocks all our notions of common justice, of our English freedom, of our constitutional rights, and which, as injustice even to the guilty in a land of liberty always does and should, turns our sympathy away from the law to the criminal, and induces in us a desire to help the latter, and oppose and beat down the former.

We are told that this fine off-shoot of Anglo Saxon liberty, now so vigorously flourishing in the democratic soil of New-England, is a cross produced by certain Eastern magi—certain Maine lawyers—who clubbed their wit and lore in getting above ground this new seedling. I am sure that it did not derive its origin from any of that accomplished band known to your Honors, or of whom we have heard in praise; but from some of that ignorant *or* corrupt, or ignorant *and* corrupt crew of the profession, who in former times hung servilely on the skirts of the Court, and to gain Court favor advised forced benevolences, and ship money, and mingled largely in Star-Chamber prosecutions, and whose types and likes here now hang as servilely on the skirts of the people, and pander to their passions, and foster their fanaticism, and inflame their prejudices, always willing for fleeting popularity or still more fleeting place and power—to betray our ancient freedom and endanger our liberties under the guise of necessary or beneficial law. Such men hunt around the old armory of the law, for some rusty and long disused spear or misshapen sword of barbarous times, and because they have found it there, feel entitled with it to pierce our Liberty in its most vital parts, or to hack to pieces its most vigorous and useful limbs. They read Magna Carta only to misunderstand or pervert it. They dig around the roots of our English Freedom not to water them so that they may flourish afresh in our virgin soil, but to expose them to the sun, so that they may dry up and wither away, talking all the time about the declaration of Independence, as if political freedom were good for any thing without old fashioned personal security. They pore over our American Constitutions and Bills of Rights only to see how in pursuit of some favorite scheme of the hour, some popular fancy of the day, they may evade their provisions without openly violating them, they may escape their spirit and substance by observing to the common eye their letter and form.

It is just this ignorant and wicked practice upon the Constitution of Rhode-Island in those its most sacred provisions, which coming down to us from our English ancestors, embody the long tried and well approved securities of our personal rights of life, liberty and property, of which we complain in that portion of the act in question to which we have called the attention of the Court. We are not insensible to the value of our *political* privileges—the right of electing and of being elected to offices of power and trust in our government; but we also clearly perceive that even these are valueless without well guarded personal security—that they give us but a formal privilege of electing our own tyrants, or worse than all of being elected the tyrants of others, the elector and elected both being the mere slaves of an irresponsible, and it may be of a passionate or prejudiced majority. Such miscalled liberty as this we do not think worth possession. It may magnify the citizen for a while, but it emasculates the man forever. He may sing sweetly of the glories of the republic, but under such degrading influences, will lose all that which can prompt and enable him to do, and dare and die, if necessary, in her service. Nor under such circumstances can even the form of liberty long remain; but that too, will pass away unregretted, and be hid, as we hide in the earth the decaying corpse of a friend, because all that made its substance and value—all that made it pleasant in life or endurable even in death, had departed long before.

We are not afraid to speak thus strongly before this Court, so learned in the past, so instructed in the present, and so able to reason concerning the future, of the value of those constitutional provisions which guard the personal rights of the citizen—his rights of life, liberty and property. It is written in every page of the history of the people from whom we are proud to derive our judicial institutions. It is sanctioned by every hour of our experience. It is approved by every teaching of our philosophy, whether of that which rightly reasons from the known nature of man, or that which dealing only with the actual, illustrates by examples drawn from the histories of nations. Hence, these provisions are embalmed in the terse and rugged lines of Magna Carta. Hence, their life is found in many an ancient statute written in barbarous Norman, regulating and enabling the due enjoyment of them—the Peers and Commons demanding and the King granting them. Hence, they find their place in those long drawn Petitions of Right which in quaint and involved diction inform us never-

theless of the true causes of that great struggle in the mother country which ended in placing on a firmer basis all that is valuable in English liberty. Hence, the protests and petitions of our Revolutionary sires are filled with complaints of the invasion of these their ancient rights, by the King and country from which they sought to separate themselves, and hence, every bill of rights and constitution adopted by the people of these states and of this country begins with the enumeration of these sacred rights and with the appropriate provisions for their due observance, laying them, as they really deserve to be laid, as the very basis of our liberty, regulated both for the individual citizen and for the government over him, by *Law.*

The provisions to which we refer, are those well known provisions which guard the rights of an accused person when proceeded against by the state in a criminal prosecution, and which relate to the process to which he is entitled, including the service of it, before he can be put upon his trial, his mode of trial, and his rights during trial, and follow him up, guilty though he be, even to his sentence and punishment. They are found in our Constitution put down in short terse sentences—alluding to much, describing but little,—bringing up by a single line, the record of a long history, every clause pregnant with meaning, every word redolent of the struggles, the sacrifices, the sober and useful triumphs of the past, and intended to be conservative to all time of our rights in the future. They are not a letter or a form, but a spirit and a substance. They mean something real and substantial, for which patriots have contended and heroes died in past times. From their very nature there is, there can be, no such thing as really and practically defeating them, and yet, because formally, legally observing them. Such an attempt upon a mere statute, though long drawn out in specific provisions, would be adjudged not only a violation, but a fraudulent violation of it!! How much more such an attempt upon a Constitution, in these its brief and fragmentary declarations of our rights, secured by well known and long accustomed bounds set to the power of our rulers over us.

Now what we charge against that portion of the act in question upon which the proceedings set up in justification of the seizure and detention of our property are based, is, that it was designed and calculated to deprive persons prosecuted for the offence created by it, of those constitutional guards which are set about them, and which regulate in such a case the process against them including the service of the process, the trial and mode of trial before they can be reached in such

a prosecution, in life, liberty or property, and that it is therefore unconstitutional and void.

We charge upon this portion of the act, not that it merely alters *forms*, which it is perfectly competent for the legislature to do, but that it really and substantially takes away and was designed to take away, the rights which under certain forms, have long formed the sufficient guard of an innocent and accused person, criminally informed against, both against the power of the government and the malice of the informer.

These rights are plainly set down in section 10th, art. 1 of the Constitution of Rhode-Island, entitled "Declaration of certain Constitutional Rights and Principles," which is as follows :

"In all *criminal* prosecutions, the *accused* shall enjoy the right to a speedy and public *trial*, by an impartial jury; to be *informed of the nature and cause of the accusation*, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself, *nor shall he be deprived of life, liberty or property, unless by judgment of his peers or the law of the land.*"

In this pregnant section are so plainly set forth the rights of an accused person in a criminal prosecution, and especially—that he shall be named and so accused in the process against him—that he shall be served, and so certainly informed that he *is* accused of crime—that he shall be informed of the *nature* and *cause* of the accusation, so that he may prepare for his defence—that he shall be confronted with the witnesses against him—that the trial shall be in the old common law mode, "by an impartial *jury*"—that he shall have what the common law did not accord to him compulsory process, if need be, at the expense of the government, to procure witnesses in his favor—and that he shall have the assistance of counsel in his defence as well as be at liberty to speak for himself, that I should not detain the Court a moment in its consideration—were it not to notice the ignorant supposition of some that the specific provisions of this glorious section were in some sort limited by the paraphrase of a portion of that celebrated clause of the 29th chapter of Magna Carta with which the section winds up "nor shall he be deprived of life, liberty or property, unless *by the judgment of his peers, or the law of the land.*" Some have been wild enough to argue that the words "or the law of the land"—might be construed to limit all that precedes it: and so that the trial be according to the law of the land for the time being—it was constitutionally well enough,

however violative that law might be of the express provisions of the section. That this was not true of Magna Carta, and is not of any American Constitutions which have borrowed the phrase from it, is well known to every moderately informed jurist.

So far was the phrase "*or by the law of the land*," as it originally stood in Magna Carta, from being intended to limit the subject's right to trial by jury—it was the very clause which secured it to the commons—meaning "due process of law" in criminal cases, as known in England—including trial by jury as well as the other muniments of right which that process secured to an accused person. Trial by jury was the distinguishing characteristic of the English law—and with its accompanying process, was, by figure, in this short and pithy instrument, intended to be included and signified—in the phrase "*law of the land.*" The words, "*by judgment of his peers,*" as they originally stood in Magna Carta, however they have since been construed both in England and in this country, had no reference to trial by jury whatsoever, but to the ancient right of peers of the realm—that is, of all above the degree of a Baron, to be tried by peers of the realm: "per *legale judicium* suorum parium," as Lord Coke notices, as distinguished from "*veredictum*" the peers pronouncing judgment upon their honor, whereas the jurors brought in a *verdict* or sworn declaration of the prisoner's guilt. He explains the words "by the law of the land" to mean "due process of law,"—and the substantial requisites of such process are duly set forth by him.

See 2 Coke's Institutes, 48, 49, 50 &c.

It is true that Blackstone treats the phrase "by judgment of his peers," as intended to secure trial by jury; and so by his time, it was commonly supposed to mean, and had at all events by construction and adoption got to mean, in England, as it certainly does mean in the constitutions of this country.

3 Blackst. Com. 350, 4 H. 424 v. 3.

Thomson's Magna Carta, 228, 229.

But whatever may have been the original meaning of these words as a matter of legal antiquarianism, it is perfectly well settled that they do not in any manner limit or impair the rights of trial; but meaning "due process of law," according to the law of the "English land," are rather intened to include and signify them. 2 Kent's Com. 13, n. b. and cases cited. 1 Tucker's Blackstone, app. 304–5. 3 Story on the Constitution, 661. Taylor *vs.* Porter, 4 Hill, (N. Y.) Rep.

Indeed, in the 5th article in amendment of the Constitution of the United States, the words, "without due process of law," are substituted for the more ancient phrase "or by the law of the land," as the modern and more appropriate rendering of it; that Constitution, as well as almost all others, specifying in other clauses what this "*due process*" is. But if they did not specify, the English law, in most substantial requisites would: so that this celebrated extract from the 29th chapter of Magna Carta everywhere now means, that in a criminal prosecution no man shall be deprived of life, liberty or property unless by judgment of his equals, meaning trial by jury, conducted substantially according to the due process for that trial and by the accustomed steps that lead to and follow it, provided by the Common law.

Now upon a comparison of the provisions of the 11th, 12th and 13th sections of the act in question regulating the process and trial with the above 10th section of article 1st of the Constitution of Rhode-Island, it will be seen at once, how artfully they dispense with, or practically forbid all that the Constitution in this respect requires. They do not say in so many words that there shall be no process—that there shall be no service upon the accused—that he shall not be *named* even in it—that he shall have no information from it of the nature and cause of his accusation—that he shall have no trial by jury; the men who framed these sections had just wit enough to know that *this* could not constitutionally be; but they had not wit enough to know that it can as little be in substance and effect as in form, and that where the provisions of a criminal law are designed and calculated to deprive the accused person of his constitutional rights of trial, and upon prosecution under it to forfeit his property, these rights, so well defined by the usages of so many years, cannot be taken away by a mere cheat and delusion. They vainly supposed that what could not be *overcome* in the constitution, might in military phrase, be "turned"—and so eager were they in the pursuits of benevolence, that they thought it no sin to attempt to defraud one whom they might accuse out of those guards of innocence guaranteed by the constitution, so that he, or at least his property, and perhaps both, might be entirely at their mercy.

No one can read these sections attentively without seeing this design written upon almost every line of them—that they were gotten up for the express and hardly concealed purpose, which they are well fitted to accomplish, of procuring a forfeiture of the property of a citizen, of a kind grown to be ob-

noxious, on the ground of a criminal intent of somebody concerning its future disposition by way of sale, without notice or common chance of defending it or himself, everything being so arranged by them, that either the owner of the property shall not be notified at all, or if notified, will not dare to appear and defend, and at all events, will be deterred by pains and penalties provided by the act itself from appealing to a jury.

Thus, to go into particulars, let us look,

In the first place, at the form of the process, and mode of serving it, directed by these sections, viewed relatively to the purpose to which the sections put the process.

It is not enough to say, even if this were so, that the form and service here directed are constitutionally sufficient for a mere "warrant of search," as this is *called*, intended to place property and person within reach of the law, so that both may be duly proceeded against and disposed of, for an alleged crime, intended by the one in the disposition of the other. This might be admitted. The question here is, whether the process directed by these sections is constitutionally competent to the purpose and use to which this portion of the act in question, puts it—to wit, the trial and conviction of the criminal—the forfeiture of his property on account of crime, it may be, and in this case is, of large value—and the imposition upon the owner or keeper if he should dare to appear and defend it, of a fine, or, in the alternative of its non-payment, of imprisonment. Our very charge is, that the framers of this act raked out of the armory of the law an old and well known process, fit enough when in proper form, and, properly used, for the purpose for which the law of the land designed it—to search out and seize persons and property and hold them for final process—and unconstitutionally applied it to a purpose for which it was not designed, the purpose of final trial, conviction and punishment by forfeiture, in criminal prosecution.

In final process of a criminal nature I understand that as there must be an accusation, so there must also be an *accused*, as well as an accuser, found out before such process issues against him, and at least before the trial proceeds—that he must be named or attempted to be named in such process, and so described in it that the officer may, as he should be directed, search him out and serve him either by arrest or summons, so that he may be certainly informed of the accusation against him, and thus certainly be able to appear and plead to the accusation. I understand there must be due provision for personal service of such process upon the accused, so that he may be certainly informed of the accusation against him before his

trial proceeds, and his criminality is adjudged, and the consequences to his person or property follow.

I understand, further, that due provision must be made that "he be informed of the nature and cause of the accusation against him," meaning, of course, the accusation of which he may be convicted, and for which he may be sentenced and punished. Who ever heard before of a final criminal process in the shape of indictment, information, or complaint and warrant, known to and used by "the law of the land," in which all these requisites, with the greatest exactitude, to the nicest certainty, did not concur? Who ever heard before of final criminal process, in which every one of these requisites, was, almost by the very words of the act creating the offence and directing the process, required to be omitted from the process?

The process is called "a warrant of search," in the 11th section, and the act *thus* indicates its form and requisites, as well as by what the officer is directed to do under it. From both of these sources of information vouchsafed to us, as no person is to be seized upon the process, we should infer that the name of the owner or keeper need not be, it was supposed would not be, inserted in it.

This is still more evident from the direction to the officer to summon the owner *or* keeper, "if *known* to him"—not, "if he can be found"—the ordinary language of process; because, if named and described in the ordinary way, he would be known to the officer, and the only question would be, whether he could find him.

But not only need not the *owner* of the goods to be forfeited be named in the process, but even if the officer should happen to know him, he is not absolutely directed to summon *him;* but in the alternative to summon either him or the keeper or *possessor*, (as it is explained in the beginning of section 12,) leaving the choice, it would seem, to the officer himself; and that too, for the act makes no distinction, whether the keeper or possessor of the goods be the agent of the owner, or a tortious possessor of his property.

But what I would especially call the attention of the Court to, is, that by the provisions of the act, the magistrate is to go right on and forfeit the property for a supposed criminal intent with regard to it on the part of somebody, even though the owner, keeper or possessor be unknown to, and not summoned to appear before him!! I had forgotten: there is a provision in section 12th, that if the owner, keeper or possessor, "shall be unknown to the officer," the officer shall advertise the seized liquors for two weeks, by *posting up a description of them in*

some public place; but strange to say, not for the purpose of giving this imperfect chance of notice to the owner in order that he may appear and defend his property and himself; Oh, no! that would be too good; but, as the section expressly tells us, lest the liquors should chance to belong to some town and city—having been purchased by its agent to sell for medicinal and mechanical purposes, and sudden destruction should come upon them; and so the section goes on to provide, that if the liquors should turn out to belong to such agent, they shall be delivered to him. Conscious that they were proceeding without due inquiry or notice, and in most indecent haste, in the destruction of the proscribed property, the framers of this section seem to have feared that they might injure their own friends—the monopolist towns and cities, or their agents—and hence this precious clause for *their* security; for it is plain that unless known by chance to the officer, and unless he should choose to summon him, neither owner, keeper or possessor would have any right to appear and plead to the process. There is no provision that either should do so upon the advertisement, and the section which directs the advertisement, expressly gives another office to it.

All this teaches us what is intended by the words of the complaint—"that spirituous liquors are kept or deposited and intended for sale, by *any* person not authorized"—words in themselves perfectly compatible, to say the least of it, with the idea that the complainants are to charge some person, to be by them named, with the offence. But construed by the other clauses to which we have called attention, it is plain, that these words were intended to mean no such thing—to impose no such onerous duty upon the complainants;—but that knowledge upon this point was to come from the officer and not the complainants,—that *he* was to summon either owner, keeper or possessor, whichever he might chance to know—although he might be selected by the complainants to take charge of the process, and probably would be, for the very reason that he did not know who these persons were, and would not inform himself.

We think that we do no violence to this act by construing this portion of it as we have done; for this is the very mode in which it was construed by the Court of Magistrates of the city of Providence, the most intelligent tribunal in the State to whom this jurisdiction is confided; and so they received the complaint in this case, and so they issued their warrant, without any person being named in either as the person by whom the criminal sale was intended, or whom the officer was

to summon to defend the seized property ; and so we witness in this complaint, intended to be the sole accusation upon which trial was to be had, that most singular charge that these liquors were intended for sale by " some person," and afterwards added in court by way of amendment, " to the complainants *unknown*." Yes, the complainants in this case swore, and the act intended that they should swear to the *intent* of a person they also swear they do not know, as the sole ground upon which for such criminal intent his property is to be forfeited.

It will be noticed too, that the act does not require to be stated in the complaint that the criminal intent was entertained by the *owner*, since it is enough if the complaint state that the property was intended for sale by the owner, keeper or possessor at some time or other, in some place or other, and whether the keeper or possessor be authorized by the owner to entertain such intent or not. Indeed, the act does not require any accusation of crime to be made against the owner at all, in order to the forfeiture of his property, unless you deem to be such, the criminal intent of another man with regard to the future disposition of it.

If it should be said that this is the offence created by the act, or that this is included in it, and that a man's property was intended by the act to be forfeited for another's criminal intent with regard to it, though he did not participate in that intent, you involve yourself in a worse difficulty : for the act creating such a crime, to be attended by the forfeiture of property, is void, as a gross violation of the right of property which is protected by so many clauses of our constitution. It amounts to a mere confiscation of goods. It violates the security to one's person, papers and possessions against unreasonable seizures guaranteed by sect. 6th, art. 1, of the constitution. So far from giving him a remedy for a wrong done to him in his property, as provided for him by section 5th, article 1, of the Constitution, it visits an injury, intended by another to his property, with the strange redress of a total forfeiture of it. And if it should be said that nevertheless the public good requires that property of this kind should be thus forfeited, we turn the assertor over to section 16th, article 1, of the Constitution, which provides, that where private property is thus taken for public uses, it must be upon the condition of " just compensation." Indeed, we need not labor before this Court to show that under our institutions it is not competent for the legislature to pass an act punishing one man for the criminal act or intent of another, in which he does not participate.

Such a statute would not be "an *ex post facto* law," but would be far worse; a retroactive criminal law being tame in iniquity, in comparison with one which punishes a man who has done no evil deed, and harbored no evil thought whatsoever. In the language of the Supreme Court of New-Hampshire, in the 7th clause of their opinion recently delivered upon the constitutionality of a similar law referred to them by the Senate of that State, and when speaking of a clause in that act which punished the owner of a house for any sale by any person made within it—"This does not seem to be in accordance with the spirit of our Constitution, or of any code of laws known to civilized man."

But consider this as ever so good trial process in the Court below—how is it for the purposes of the act in the Court above? since there too, if he should presume to appeal and appear, it is the only accusation to be made against him, for the trial and punishment which the act provides for him in that Court.

There certainly, if not in order to the forfeiture of the property seized, by the express words of the act, in order to his fine or imprisonment, the appellant is to be tried upon the warrant for the offence that the liquors seized were intended *by him* for sale contrary to the act. But of what if convicted of this, he is to be adjudged guilty and for what is he to be punished on this process by the appellate Court? Not for having liquors in his possession or owning liquors intended for sale, which is all that by any implication can be said in even the loosest manner to be charged against him—and all therefore which can be inquired into or decided upon—all which can be proved against him, or upon which he can offer proof in his exculpation—but of another totally different and higher offence, that of being "a common seller," and consequently by the act punished with a higher fine, and, in the alternative of its non-payment, with a longer imprisonment than the act imposes upon one adjudged guilty of the offence charged in the complaint and warrant against *anybody*.

Surely, if this clause in our Constitution requiring an accused person "to be informed of the nature and cause of the accusation" means anything substantial, it means that he shall be informed in the process, as according "to the law of the land" he hath ever been, of the nature and cause of the accusation of which he is in danger of being adjudged guilty, and for which, if guilty, he is to be punished!! It is mere mockery of this provision for personal security to require, as this act does, that the accused person shall be adjudged guilty of something entirely different from what is charged, not contain-

ed in it, as manslaughter may be said to be in a charge of murder, or common assault and battery in a charge of assault and battery with a felonious intent, but of something *higher* as well as *different*, and for which he is to be visited with severer pains.

We think we may safely conclude upon this point, that no one can consider the complaint and warrant directed by this act, due trial process under the constitution, for the purpose at least to which the act puts it in the appellate Court, unless he be constituted like the Irish jury, who, according to the well known story, brought in a verdict of manslaughter against one indicted and tried for horse stealing.

The *second* ground upon which we claim the portion of the act which authorizes and regulates the proceeding under which the defendants justify, to be unconstitutional and void, is, that it was designed and is calculated to obtain a forfeiture of property on account of a supposed criminal intent with regard to it, *without any trial whatsoever*—in derogation of section 10, art. 1 of the Constitution of Rhode Island, which provides that, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public *trial*," with, as what follows in the section shows, full opportunity and ample means for his just defence.

No one can read and attentively consider the several provisions of the sections regulating the process in its several stages, without perceiving this unconstitutional design, and how artfully these sections are contrived to carry it into effect, without, in so many words, denying a trial. Hence, the looseness in regard to requiring any one to be named in the process as the criminal, or to be charged with any crime, to which we have already adverted. Hence the strange departure from the invariable command of criminal process, that the accused be seized and held to recognize for his appearance to it, of which the tender mercy is cruel. Hence, the strange direction to the officer to summon the owner, keeper or possessor, no matter which, provided always "he be *known* to him," leaving it quite optional with the officer who may be selected to procure the forfeiture, whether he will summon any one or which he will summon—all explained by the act requiring the magistrate to go on and adjudge the property forfeit and to be destroyed, whether any one be summoned to appear or not. Hence the peculiar phrasing of the 12th section with regard to the purpose of the advertisement directed, in the event the officer does not know and does not summon owner, keeper or possessor, neither of whom can appear upon the advertisement, but only

if summoned, and then only in person, the appearance by counsel, as in this case it appears from the plea, being rejected.

But what I especially invite the attention of your Honors to, as evidence of this design, and as calculated, at least in all cases in which a small amount of this kind of property is seized, to carry it into effect, is—that unless you construe the section to mean that the magistrate shall impose a fine upon an owner or possessor whom he does not know, who is not named or summoned, and does not appear—which would be both foolish and fruitless—the eleventh section visits upon whoever does appear to defend the property seized, whether owner or possessor, a penalty of twenty dollars, or in the alternative of its non-payment, an imprisonment of thirty days, for no other reason that can be imagined than because he has presumed to defend the property, and with the view and certainly with the effect, of deterring him from attempting its defence. Nothing could be better devised than this to ensure in the greater number of cases, the petty cases especially, the forfeiture of property on the ground of an alleged criminal intent as to its disposition, upon the *ex parte* statements of three men, as to their reasonable belief that this criminal intent is entertained by somebody or other, to be carried out at some time or other and in some place or other, without any *trial* whatsoever, unless indeed we are to take the definition of what a trial in a criminal court is from this act, rather than from the Constitution.

But farther, it is by no means clear under this act, that if the owner or possessor should happen to be summoned, and should dare to appear to defend the property against the alleged criminal intent with regard to it, he would be entitled, so as to have any effect to save the property from forfeiture, to offer proof in his exculpation from this intent; for, by the express words of section 11th his right of defence of the property would seem to be limited to proving the liquors seized to be of foreign production, to be legally imported, and to be in the original packages in which thus legally imported, and "unless" he can do this, the property seized is to be forfeited and destroyed.

It is true that in the last clause of the next to the last sentence of section 11th, the words, "if in the opinion of the justice or court the liquors were intended for sale," are brought in, as if, by the by. But it will be noticed from their connection and from the pointing of the section, that they seem to relate entirely to the imposition of the fine, and not at all to

the forfeiture of the property, which is lost upon the mere accusation, unless proved to be imported &c.

And even if, in defence of the property, the magistrate is under the act *entitled* to receive evidence from the respondent exculpatory of all criminal intent on the part of anybody with regard to it, is it not plain that the act was intended to convey to him the impression that he is *not bound* to receive such evidence—"*if in his opinion*,"—mark the word—the property was intended for sale—if, in other words, he is satisfied with the *ex-parte* statements of the three voters as to their belief about the intention of a person to them, it may be, as in this case, unknown.

But what, at all events, are we to say of a criminal act, which scatters doubtful words upon so important a matter as the right of defence on the part of him whose property is in danger from criminal process, amongst, in general, ignorant and prejudiced magistrates—which requires to be tortured from its plain signification, before we can gather from it that the accused can appear for any other purpose than to be fined, and see his property, or the property of another, without proof, upon the mere accusation, destroyed before his eyes.

As if to shut the owner out from all hope or chance of saving his property of this kind when once seized upon a doubtful accusation, the twenty-third section of the act provides, in its last clause, that in no case shall he be able to maintain any civil action to recover it, or its value: in plain and direct opposition to section 5, article 1, of the Constitution, which secures to "every person in this State a certain remedy by recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character."

But why multiply proofs of what is so evident—that these sections were artfully contrived to procure a forfeiture of property on a criminal charge, without *trial*—that they are calculated to produce that effect—and that *they* therefore, and all proceedings based upon them, are unconstitutional and void.

The *third* ground upon which we maintain the three sections of the act which authorise and regulate the proceeding under which the defendants justify, to be unconstitutional and void, is, that they are designed and are calculated to debar the accused, in the criminal prosecution which they institute, from his well known constitutional right, in such a prosecution, of trial by jury.

Our Constitution, in common with that of the United States, and of the States in general, is explicit in its provisions intended to maintain and guard the trial by jury—that time-honored

institution of the common law—of "the law of the land," as Magna Carta terms it. In addition to the plain and minute provisions of section 10th article 1 of the Constitution in regard to this trial in criminal prosecutions, to which we have already, in another connection, called the attention of the Court, the People of Rhode-Island have still further manifested their will that this institution shall be preserved as the *right* of the citizen, by declaring, in section 15th article 1 of the Constitution, that, "The *right* of trial by jury shall *remain* inviolate."

We understand by this clause, not only that the citizen is entitled to this right, already secured to him in criminal prosecutions by section 10th, but that he is to enjoy it *as* he has been accustomed, freely and fully, in the manner substantially, upon the terms substantially, that he has been used to enjoy it. We understand this clause as being especially directed against all new fangled legislative experiments limiting restricting or clogging this right. It literally points to the past as the measure for the future—and declares, as plainly as a constitutional provision can, not only that no law which absolutely forbids it, but that no law which is calculated to shut the citizen out from the free enjoyment of this right, none which renders access to it dangerous or difficult, shall stand a moment before the constitution.

Nor was this cautious jealousy of the right of trial by jury on the part of the people of Rhode-Island strange, or, as the passage of the act in question shows, uncalled for. The trial by jury is the people's participation in legal proceedings—the long accustomed mode in which they govern themselves judicially, as in other modes, through elections and the like, they govern themselves legislatively and executively. The constitution designed to place it out of the power of the General Assembly to tamper with this right, to disfranchise either by direction or indirection, the people of the power thus reserved to them in the doings of the courts, to impair in the least this great guard of personal security, from its nature so protective against the efforts of power or the freaks of passion or prejudice. It supposed that there might arise men embarked in a very good cause, who to attain their ends more readily—and unthinking of the greater evils they might produce—would be willing to place the people under a sort of guardianship for the time being, so that they could not meddle, through trial by jury, with the execution of the favorite scheme of benevolence, and who would thus avoid the inconvenience of having the process which leads to punishment too slow, or too costly, or

too uncertain in its result. The history of our ancestors abroad and of our ancestors at home afford us many instances of such attempts, always rebuked by the people as soon as they came to their senses, or gathered their power, but too frequent not to render caution, in respect to the preservation in its entirety of this constitutional right, a first duty.

It is well known that attempts of this kind never take the shape of direct prohibition, for that would be too palpable to deceive for a moment. They have been made in the guise of the creation of new courts or the extension of the limited jurisdiction of old ones, which proceed or are to proceed, without a jury, according to the course of the civil law. They have been made by so dealing with and confining the persons of the accused, that they are never brought to trial, but are *forgotten*—that most forlorn of all conditions which tyranny has has had power to impose upon violated man. They have been made by imposing such onerous conditions upon the enjoyment of this right, or by so increasing the penalties upon the accused if he should presume to seek it and chance to be convicted, or by both, that the accused is fain to sit down by the first injury, as the least, after all, which he may be called upon to endure.

It is in this last way that the act in question is designed and calculated to impair the right of trial by jury, to compel the accused to sit down by the judgment of forfeiture by the inferior magistrate, whose appointment to office may have been procured, or whose conduct in it may be controlled, by the popular leaders of the day, lest a worse thing should befal him.

By our system, there can be no trial by jury before a Justice of the Peace or Court exercising the jurisdiction of such a Justice. The act, by committing the matter to such magistrates in the first instance, rendered it necessary that an appeal should be open to the accused to some court which sat with a jury: and accordingly, an appeal is, *in form*, provided by the act to the Court of Common Pleas, as the avenue through which a jury trial may be reached. We should not complain, if the gate of this avenue was as wide open, or as easy swinging, as it is in ordinary cases of criminal appeal. such as petit larceny or the like, or even as it had been previously in this class of cases. But we do complain of the onerous and unusual conditions with which the 13th section of this act loads an appeal, as, in the vast majority of cases, amounting to a practical denial of it, and of the right of trial by jury which can alone be had through it. We do say that no man can read, much less

consider these conditions, without perceiving that they were intended and are calculated to bar the access of the accused to the only avenue, to wit, an appeal to the Court of Common Pleas, through which, in a criminal case involving the forfeiture of property and fine or imprisonment, he can reach trial by jury.

Let us look at these conditions of and penalties upon the appeal more nearly, and mark the effect which they were designed and are calculated to produce.

First. The appellant, besides paying for his copy and the entry of his appeal in the court above, must pay down all costs of the court below, it may be, amounting to a large sum, as under the act the testimony, at the request of either party, is to be reduced to writing, for use in the appellate court in certain contingencies. Thus, the costs below of the proceeding of which we complain amounted to an hundred dollars. The payment of these costs by the appellant for his appeal is a dead loss, and cannot by the terms of the act, however successful he may be in vindicating his innocence in the court above, be recovered back in whole or any part.

This is hard enough in all conscience, but was supported by the Supreme Court of this State in *Littlefield* v. *Peckham*, 1 Rhode-Island Rep. 500, against the objection that it was an unconstitutional clog upon the right of appeal for trial by jury. The ground taken by me as counsel for the defendant, and affirmed by the court in support of the provision, was, that it was a provision merely in regard to the *costs* of the proceeding, which must be paid by somebody, and by whom, was always a matter, in all legal proceedings of statute regulation exclusively —that our own statutes had, from time to time according to the nature of the proceeding, visited costs and even double costs upon a party for his appeal, or ordered them to be paid by the losing party, or divided them between the litigants, or put them upon either party or both, according to the discretion of the court—that in criminal cases, including appeals, the accused had never been allowed to recover from the State his costs—and that the court could not say that the requisition, that he should, if he failed below, pay to the State the costs of his trial there before he could appeal, was not a reasonable exercise of legislative discretion, required to meet the demands of public justice. We all felt that this was going quite far enough in clogging appeals from magistrates in criminal cases, especially when applied to a selected class of such cases : and, at all events it was as far as the decision of our Supreme Court went. To guard their decision in that case from being drawn

into a precedent to sanction other and more oppressive conditions of appeal, as if prescient of this act, they say in their opinion (page 508) "Should they, (the legislature) at any time, disregarding the right of trial by jury, make provisions so unreasonable, prescribe conditions so oppressive, as to evince a design not to regulate, but to deny the right altogether, the time will have arrived when this court will feel it their duty to declare such provisions void, as against the constitutional right of the citizen."

Let us look a little farther into this act, and see, if when the legislature passed it, the time had not arrived when the duty spoken of in the above extract devolved upon the courts; for, the

Second condition upon which the accused is to have his appeal for jury trial—imposed by the 13th section of this act. is, that he is to give recognizance in a sum *not less* than two hundred dollars, with good and sufficient *sureties*, not only that he will file his reasons of appeal, enter his copy of the case, appear before the court and prosecute his appeal with effect—which are the ordinary conditions of the appellant's recognizance in a criminal appeal—but in addition, "that he will abide and perform the order and sentence of the court in said case, *and pay all fines and costs that may be awarded against him.*"

Having paid the costs below and irrecoverably lost them, *this* condition of appeal requires him by a recognizance in a large amount—*not less* than two hundred dollars—to secure, by *two* sureties at least, the *fine and costs* above—instead of allowing him, as is usual in other cases, and as he is allowed below in this, the valuable privilege to a poor man, of paying his fine by the alternative of imprisonment of his body, and as indeed it is *colorably* provided by this act, that he may. We see at a glance, that this condition is a practical denial of jury trial in this class of criminal cases to every man who cannot give a bond, with sureties in the sum of two hundred dollars *at least*, conditioned to wait a distant and doubtful result, and that it cuts off all poor men from jury trial at a single blow.

But the full meaning of this condition cannot be understood without looking at the

Third condition, or rather penalty, which this act imposes upon an appeal, no doubt intended to cast the fear of a stigma which *all* might feel, and add its force to deter the accused from a jury trial, to the oppressive conditions which the *poor* would especially feel. For, by the terms of this act, (12th section) in case of any such appeal, where the quantity of liquor seized exceeds five gallons, if the decision be against the appellant, he shall

be adjudged "a common seller," and subject to the penalties provided in section 8th for that offence, and is therefore as we have before seen, to pay a fine of one hundred dollars, that is, a fine five times as large as that he would have paid had he not appealed, and be advanced a step nearer to still higher penalties provided by the act, for that obnoxious character, a common seller, upon a second conviction for his offence.

I have already adverted in another connection to the strangeness of this sentence upon one who is not charged with the offence to which the act appropriates it by the eighth section, and against whom it has not been proved or pretended; but I now call attention to it for the purpose of unfolding the mystery of its iniquity, which is neither more nor less than by penalty upon penalty, coupled with the fear of the stigma of a bad name, to deter an accused person from his constitutional right of trial by jury; to make him sit down with the forfeiture of his property on a criminal charge, by the judgment of a justice of the peace; to prevent him at all hazards from appealing for protection to a jury. It is a mere penalty upon him for presuming to appeal. It is a price he must pay, a danger he must endure, in order that he may enjoy that right which the Constitution says "shall remain inviolate." It can have no other design, and it certainly is calculated to produce no other effect, than the illegitimate, the unconstitutional one, of frightening him from seeking a jury. It is as if the law were to say to one complained of before a justice and convicted of petit larceny, and who prays an appeal to a jury—"yes, you *may* appeal, but if you do, and are convicted, you shall, however innocent of those crimes, be convicted of and punished for robbery or murder."

Well might the Supreme Court of New Hampshire, in the opinion to which I have adverted, (clause 5,) declare such a provision in the act referred to them, as a penalty and clog upon jury trial, unconstitutional and void!! Well may we contend, in the language of our own Supreme Court in *Littlefield* v. *Peckham*, that this is a condition so oppressive, a provision so unreasonable, "as to evince a design not to regulate, but to deny the right altogether." Who ever heard of such a contrivance before in Rhode-Island? Who will maintain that if suffered to have force here, "the right of trial by jury will remain inviolate," as it is provided that it shall, by our Constitution?

Yet it is of a piece with the whole of this robe of sin which we have hastily borrowed, and imported, and put on to our shame, though, thank God, not *made* for ourselves. And now

with old Lear, though in a saner mood, and like him suiting the action to the word, we cry out

"*Off, off, you lendings.*"

You were not made for that "forked radish," man, at least as he has received his form and pressure from the constitution and usages of Rhode-Island. You disfigure him now, and the poison which lurks in your web will infect him to his death hereafter.

We come now to our grounds of demurrer under the second general head, to wit: to those relating to the actual form and service of the warrant and to the proceedings under the warrant, as the same are set forth by the defendants in their avowry by way of justification; and under this general head, shall consider the complaint and warrant, in its two-fold character of a warrant of search, and as trial process.

Considering the complaint warrant, &c. in the character of trial process—we maintain, that even if your Honors should be of opinion that, upon a fair construction, the act in question required all that legal certainty in, and due service of the complaint and warrant, necessary to fit it constitutionally for trial process—and that in other respects necessary in this case, the act was constitutionally valid—still, I say, we maintain, that the complaint and warrant, &c. upon which our property was seized were actually deficient, as the plea shows, in those conititutional requisites which were necessary to fit it for the purpose for which it was used against us, as trial process, and are therefore unconstitutional and void.

Upon examining the plea it will be found, that the complaint and warrant did not contain the name of the plaintiff in this action, whose property was seized and forfeited under it—nor manifest any attempt to name or describe him, or any one else, as the owner or possessor of the property to be dealt with by it, but was issued against "a person"—and when amended in Court for trial, was amended by the addition of the descriptive words "unknown to the complainants," merely. It will be found that it contained no accusation of crime committed by any one in particular, nor by any one in general, except in a manner totally devoid of all substantial certainty, and gathering what was intended by the most remote inference. It will be found, that it was not served upon the plaintiff in this action, whose goods were to be, and were adjudged forfeited for crime under it; and that when hearing of the prosecution, he requested permission from the Court to appear by counsel, to be confronted with the witnesses against him, and to be heard in proof and defence—his appearance was refused, unless, to

his great inconvenience, made in person. It will also be found that, notwithstanding all this, and notwithstanding the protest of the plaintiff made by him to the Court against their proceeding under such circumstances, the Court went on to adjudge his property forfeit and to be destroyed, and that the destruction of it was only prevented by the interposition of the writ of replevin of this Court, to which the plaintiff was entitled by *his* citizenship in one State, and the citizenship of the *defendants*, in another.

If this unconstitutional mode of dealing with an accused person in a criminal prosecution is not authorised by the act of the Assembly, it has not even the shadow of legal justification, and without taking up the time of the Court further than we have done with this part of the subject, we urge against the process and proceeding all the arguments we have before urged against the act, which we believe, unconstitutionally, was designed to authorize, and calculated to produce them.

But without regarding the complaint and warrant in question as trial process, but regarding them in their more limited character, as a mere complaint for and warrant of search, there are fatal objections to them, apparent upon their face, both constitutional and legal—and

First. They do not set forth "as nearly as may be" "the place to be searched," as required by section 6th, art. 1, of the Constitution of Rhode Island.

The description of the place to be searched, in the warrant, is as follows: "the building numbered 81, Broad street, and the building in the rear, and connected therewith running back to Middle street; also the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Samuel Pareira,) and the cellar and yards belonging to said building, in the city of Providence,"

This description of the place, as a building by its street number, and another in its rear connected therewith, and another building on another street, &c., with its cellar and yards, without even naming the owner or occupier of the buildings, &c., is much the same, as if to order by such a warrant, the search of such a block of buildings, or the houses on such a side of such a street, and approaches too nearly to a general search warrant, to be valid any where by the common law, since the great case of *Entick* v. *Carrington*, and especially to be valid, under the above article of our constitution. It lacks that most essential ingredient of such a description

in such a warrant, *the name of the person whose "place" is to be searched*, whose possessions are to be invaded, whose house or building is to be broken open and entered under it.

How can the magistrate be satisfied of the probable cause for issuing such a warrant which the constitution requires, without knowing who is the occupant of the place to be searched? What abuses may be practised under such general authority to the officer to search any body's house or place of business!! how much vexation caused, and oppression practised!!

Accordingly, the Supreme Court of Massachusetts in *Sanford* v. *Nichols, et al.* 13 Mass. Rep. 289, very properly remark upon such a deficiency in the warrant of search by that case brought under their consideration,—declaring,—that the warrant was "deficient in the description of the persons whose houses were to be searched." And so again, in *Commonwealth* v. *Dana*, 2 Metcalf, 336, the same Court, on the other hand, to an objection brought against such a warrant, that it did not sufficiently describe the place to be searched,—reply, that the warrant gave not only the name and number of the street, but especially, that it also gave *the name of the person* whose office was to be searched in the building designated, as affording the requisite certainty of description;—overruling however the objection that another person also occupied the same office.

This objection too, which we now insist upon, was, as appears by the plea urged upon the Court of Magistrates by the alleged keeper of the liquors, who was summoned and permitted to appear and defend, without effect.

The *second* objection to this complaint and warrant, is, that it does not, as required by the same 6th section of art. 1 of the Constitution, describe "as nearly as may be" "the things to be seized."

The whole of this description is "spirituous or intoxicating liquors" kept, &c. "in the building, &c." as just set forth,—without saying of what kind, in what packages, barrels or the like, and without saying in what quantity, not even whether five gallons, or more or less than five gallons, so important under the act, if you deem it valid, to the liabilities of the person in certain events whose liquors are seized. Above all, it does not mention who is the owner or possessor of the spiritous or intoxicating liquors to be seized, in any other way, than as "a person unknown to the complainants."

This extreme looseness of description of the things to be seized, as well as of the place to be searched, under a Consti-

tution which requires them both to be described in the warrant of search "as nearly as may be," is wholly unpardonable; because the slightest inquiry would have informed the complainants or the magistrates, at least, in whose possession both place and goods were, if they did not know without it.

The *third* objection to the complaint and warrant is, that when the search for and seizure of our property was made upon it, it did not state any lawful reason for the search or seizure, because it did not allege that the goods were intended for sale *in Providence;* in which case alone, under the act, the complainants, as voters *in Providence*, had power to make the complaint, and the Court of Magistrates *of Providence*, had power to issue this warrant. As it originally stood, it simply stated that the goods were *deposited* in Providence, and intended for sale, but did not say *where* intended for sale, and especially did not aver that they were intended to be sold in Providence.

This was a fatal defect, rendering the warrant void upon its face; because the warrant did not shew any jurisdiction either in the complainants or magistrates of Providence, to meddle with our goods by such a process.

Thus it stood absolutely void upon its face, when our property was seized upon it. This is admitted by the plea: but the plea goes on to state in substance, that by leave of the court and against objection made, it was ordered by the court to be amended in this respect, and was amended, by the insertion of the words "then and *there*" before the word "intended" and after the words "at said Providence, &c. are kept and deposited."

Our reply to this, is, *first*—that the court had no power to order such an amendment of criminal process without the consent of the accused, by the express terms of our general statute respecting amendments of criminal process. See Statutes of R. I. Revision of 1844, page 409, section 163, of statute concerning Crimes and Punishments.

And as to the power in this respect supposed to be derived to them from the 19th section of this "Maine Law"—it will be seen, that by the words of that section, the power of amendment there given, applies merely to warrants &c. against some *person*,—which this, properly, is not—because no person is named in it, nor, in any way known to criminal proceedings, made party to it. It is merely a warrant to search a place and seize a thing, with the hope of being able to break open the one and forfeit and destroy the other, without the intervention of any person but the complainants, the officer, and the Court, whatsoever. It is "*in rem*," and not "*in personam*."

To the question of the Court, whether there are any warrants &c., properly against *persons*, directed by the act—we reply, that there are, in several sections—mentioned or directed; and that thus the 19th section, giving power to amend such process, is satisfied with a proper subject upon which the power is to be exerted, without being allowed to apply to such a warrant as this.

But we say in the *second* place—that even if the Court had power to order the amendment in question, under the 19th section of the act—the warrant would not have been less void at the time our goods were seized under it—the essential time of its validity in order to enable the defendants to justify the seizure; for it will be recollected that the plaintiff to this action was no party to the process thus amended—received no notice of it—and is not bound by any thing done by the Court under it. If it was upon its face void when it was served—if it did not then show any jurisdiction in the complainants to lay a foundation for it—the Court to issue it, or officer to seize under it, nothing that was done afterwards could possibly help it, to justify a seizure already made.

The *fourth* and last objection which we make to the warrant, as a warrant of search, is, that it is on its face legally void, because it does restrict the search, though to be made in buildings and houses, to be made in the *day-time.*

The danger, and liability to abuse—and therefore the unfitness of allowing such warrants, when issued upon probable cause only, to be issued without such a restriction as to the season of their service, is well described by Lord Hale, when speaking of such warrants in his 2 Pleas of the Crown, pages 113, 114; and although this cautious and learned writer observes, that he will not say that they would be, without such restriction "unlawful,"—yet is evident from his expressions that he thought they either were or ought to be held so, at the Common law. It will be recollected, too, that this doubt of Lord Hale was expressed many years before the great case of *Entick* vs. *Carrington*, 2 Wilson, 275, (better reported in 11 Howell's State Trials,) called attention to the common law rights of Englishmen as to the security of their houses, papers, and possessions, against warrants of search—and before, therefore, English jurisprudence affords us a strong light concerning them. Since that decision, by statutory enactments everywhere, both in England and in this country—understood by us to be in this respect but declaratory of the Common law, and resolving in favor of the liberty of the subject and citizen the doubt of Lord Hale—such warrants when issued upon prob-

able cause only, are required to be limited to be served in the *day-time.* So was the English statute, 22 Geo. 3, ch. 58, sect. 2—and so are the statutes of Massachusetts, and so, we believe, are all the statutes giving search in this country. See *Commonwealth* vs. *Dana*, 2 Metcalf, 329. *Stone* vs. *Dana et al.* 5 Metcalf, 99—where much of the law relating to search warrants will be found in the opinion of the Court. Indeed, Mr. Chitty, in his 1 Criminal Law 64, lays down the law to be in England at the present day, that "the warrant should direct the search to be in the day-time, though *it is said* that where there is *more than probable cause* it may be executed in the night-time." Such we understand to be the true common law distinction, as to the time of search, between a warrant of search upon which houses were to be entered, and founded upon probable cause merely, as was the case with the warrant in question, and a warrant issued to search—the house of a *known* felon—or for goods *known* to be in a house, as well as *known* to be there by felony or crime.

But however this may be, as a matter of common law, a search warrant, as known to the law of Rhode-Island, whether for stolen goods, or obscene books, &c., the only cases in which our previous statutes have permitted them to issue, must by express direction, be limited to be served in the day-time. —Laws of Rhode-Island, Revision of 1844, pages 410, 394.

If it should be said that though there be such a limitation as to the time of search required in warrants issued to search for stolen goods and obscene books, yet that no such limitation is expressly required by the "Maine Law" in warrants issued to search for liquors, our reply is, that this may be true if by *expressly* you mean *in totidem verbis;* but that nevertheless, this act does require the limitation in the warrant by the very language which it employs.

The eleventh section, which directs the warrant to be issued by the magistrate, directs him to issue "a warrant of search," leaving both the form and substance of such a warrant to be defined by the general law of the State, except so far as the specific directions of the act to the officer of what he is to do under it, indicate, that such form or substance is to be altered. Now, as there is no direction in the act to the officer to execute the warrant in the night-time, and search warrants as before this act known in our criminal jurisprudence were required to limit the service of them to be made in the day-time, the inference is plain, that this act itself, properly construed, requires the warrant to contain this restriction.

The want of this restriction, we need not say, is a substan-

tial fault of the gravest character, and avoids the warrant altogether as a justification to the defendants. We feel the more entitled to the benefit of this objection, because, as the plea shews, all the buildings in which our property was seized were searched in the night-time, and one of them at least was actually broken into as late as ten o'clock at night.

Having consumed so much of your Honors' time in the opening of this cause, we will merely say in conclusion, that upon all these grounds of objection, both to the act and to the proceedings under it, we claim your judgment that the plea in justification set up by the defendants be overruled, and that reasonable damages for the taking and detention of our goods be assessed in our favor. We also take the liberty to request the Court to decide all the points submitted to them, in order that the plaintiff may know whether it will be safe for his property of this kind to remain in Rhode-Island.

Clarke, for the Defendants in support of the plea, followed.

Carpenter replied for the Plaintiff.*

On the 30th of December, 1852, the District Judge read the following opinion of the Circuit Judge.

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* Desiring to present a complete Report of this cause, the Reporter called on the Defendants' counsel, James M. Clarke, Esq., and also upon Gen. Carpenter, who closed for the Plaintiff, and requested them to furnish him with their very able and complete arguments. Owing to the pressure of their engagements, they were unable to comply with this request, in season for this edition.

CURTIS, J.—This is an action of replevin for a quantity of wine and spirits alleged to have been unlawfully taken and detained by the defendants, who justify the taking and detention by virtue of certain proceedings set forth in their avowry. These proceedings depend for their validity upon an act of the General Assembly of the State of Rhode Island, passed at its May session in the year 1852, and entitled "an act for the suppression of drinking houses and tippling shops."

The plaintiff, having demurred to the avowry, insists that some of the provisions of this act, necessary to maintain the validity of these proceedings, are in conflict with the Constitution of the State, and therefore void, and so the taking and detention complained of are not justified.

The plaintiff is a citizen of the State of New York. Under the Constitution and laws of the United States, he is entitled to come into this court, and find here a remedy for any legal wrong done to him by citizens of Rhode-Island. An adjudication upon his rights may, and in this case does involve important questions arising under the constitution and laws of the State: but in such a case it is our duty to determine them: a duty which we should neither seek, nor avoid, but perform.

The Constitution of Rhode-Island (art. 1, sec. 15) declares:

"The right to the trial by jury shall remain inviolate."

The 10th section of the same article is as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land."

Taking these two sections together, it may be said of them in general, that while the 15th section recognizes the existence of the right of trial by jury, and makes effectual provision for its preservation as it existed when the Constitution was formed, the 10th section declares not only that this right is to exist in all criminal cases, but is to be accompanied by certain incidents and modes of proceeding which are therein prescribed and defined. In other terms, in civil causes a trial by jury is to be had in those classes of cases in which it had been practised, down to the time when the Constitution was formed, and such trial is to be substantially in accordance with such modes of proceeding as had then existed, or might thereafter be devised by the Legislature, without impairing the right itself. But in all criminal cases the right to a a trial by jury, accompanied by the other privileges enumerated and defined, is absolutely to exist.

In order to decide whether those parts of this act, necessary to sustain the avowry, are in conflict with these fundamental laws, we must have a clear view of what the act contains ; and as it provides for modes of proceeding quite anomalous, and some of its clauses need construction, I shall begin by stating what these parts of the act, in my judgment, authorize and require : and I shall then consider, whether the proeeedings thus authorized and required, are in harmony with the Constitution of the State.

Under this act three voters, in the town or city where the complaint is made, may make a complaint in writing under oath, to some justice of the peace, setting forth that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited and intended for sale in that town or city, by some person not authorized to sell the same under the provisions of the act.

It is not required that any particular person should be named in the complaint, as the person intending to sell such liquors contrary to law, nor was any person in fact named in the complaint which was the foundation of the proceedings in question. Upon the filing of such a complaint, the justice of the peace is to issue a warrant of search, directed to the sheriff, his deputy, the town sergeants, or constables in the county, one of whom is to proceed to search the premises described in the warrant, and if any spirituous or intoxicating liquors are there found, he is to seize, secure and keep them, until final action shall be had thereon. The officer is further required to summon the owner, or keeper of the liquors seized, if known to him ; but there is no other provision for giving notice to the owner, or possessor, prior to an adjudication of forfeiture. There is a provision that in case the owner is unknown to the officer, the liquors shall not be destroyed, until they shall have been advertised for two weeks, to enable the agent of any town duly authorized to sell such liquors, to appear and claim them, and upon making due proof of title the liquors are to be delivered to him and not destroyed. But this has no application to any other owner, and the law expressly requires the justice to adjudge a forfeiture if the owner fail to appear.

Upon the return of the warrant, if the owner or keeper do appear, and the justice is of opinion that the liquors have been kept or deposited for sale, contrary to the provisions of the act, he is to adjudge a forfeiture, cause them to be destroyed and inflict a fine of twenty dollars, or if this fine be not paid, imprisonment for thirty days, upon such owner or keeper. An exception is made in favor of imported liquors, contained in their original packages, but the burthen of proof is put upon the

party appearing, to make out this defence. If the person claiming the liquors shall appeal to the Court of Common Pleas, he is required to enter into a recognizance, in a sum not less than two hundred dollars, with good and sufficient sureties, conditioned, among other things, that he will pay all fines and costs that may be awarded against him ; and if the final decision shall be against the appellant, that such liquors were intended by him for sale, contrary to the provisions of the act, and the quantity seized exceed five gallons, he is to be adjudged "a common seller of intoxicating liquors," and punished as such, by a fine of one hundred dollars, or in default of its payment, by imprisonment for sixty days ; and he is also subjected to increased penalties on a second conviction.

On reviewing these proceedings it will be seen, that in order to obtain a trial by jury, the party must give security in a sum not less than two hundred dollars, with two sufficient sureties, to pay all fines and costs which may be adjudged against him ; and must subject himself to the hazard of having the fine, inflicted by the justice of the peace, increased five fold, if the quantity of liquor seized should exceed, as in this case it did exceed, five gallons.

To require security for the payment of the penalty and costs, as a condition for having a trial, so far as I am informed, is a novelty in criminal jurisprudence ; and in my opinion it is not only essentially unjust but in conflict with that clause of the Constitution which secures the accused from being deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land, Natural right requires that no man should be punished for an offence, until he has had a trial, and been proved to be guilty ; and a law which should pro-

vide for the infliction of punishment upon a mere accusation, without any trial, if the accused should fail to furnish two sureties to pay the penalty which might, after the trial, be adjudged against him, would be viewed by all just minds as tyrannical: for it would treat the innocent, who are unable to furnish the required security, as if they were guilty, and would punish them, while still presumed innocent, for their poverty, or want of friends.

And it is equally clear that such a law would not be "the law of the land" within the settled meaning of that important clause in the Constitution. Certainly this does not mean any act which the Assembly may choose to pass. If it did, the Legislative will could inflict a forfeiture of life, liberty, or property, without a trial. The exposition of these words, as they stand in Magna Charta, as well as in the American Constitutions, has been, that they require "due process of law:" and in this is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it unless it is proved. Lord Coke, giving the interpretation of these words in Magna Charta, (2 Inst. 50, 51,) says, they mean due process of law, in which is included presentment or indictment, and being brought in to answer thereto. And the jurists of our country have not relaxed this interpretation. (Hoke vs. Henderson, 4 Dev. R. 15: Taylor vs. Porter, 4 Hill's R. 146, 7: 3 Sto. Com. on the Const, 661. 2 Kent 13, n.

It follows, that a law which should preclude the accused from answering to and contesting the charge, unless he should first give security, in the sum of two hundred dollars, with two sufficient sureties, to pay all fines and costs, and which should condemn him to fine and forfeiture unheard, if he failed to comply with this requisi-

tion, would deprive him of his liberty, or property, not by the law of the land, but by an arbitrary and unconstitutional exertion of the legislative power.

And if this would be the character of a law, which made the right to any trial dependent on such a condition, can it be maintained that to prescribe such a condition does not impair the right to a trial by jury. In such a case the appeal has annulled the sentence of the justice of the peace. The accused is presumed to be innocent. He has had no such trial as he has a right to have. He now claims this particular kind of trial, as the prescribed constitutional means of determining whether he is to be punished. A condition which would impair his right to any trial, if prescribed as the condition of his having any, impairs his right to this trial, if prescribed as a condition for his having it.

The 14th section of the 1st article of this Constitution declares :

"Every man being presumed innocent, until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person, shall be permitted."

Undoubtedly this clause has reference chiefly to acts of severity against the person of the accused. But it not only contains the great principle of the presumption of innocence until the accusation is proved, but points out the security of the person that he may be tried, as the only just or admissible reason for exercising any control over one still presumed to be innocent. And in my judgment any law which disregards these principles, and introduces a new object, viz : the security of the payment of the fine and costs, and denies a trial by jury unless the security is given, does not allow the right to such a trial to remain unimpaired. If this were not so there would be no limit to legislative control over this right, for if one onerous condition may be imposed, so

may any number, until the right becomes so difficult of attainment, that it ceases to be a common right, and can be enjoyed only by a few.

I find it equally difficult to reconcile the increase of penalties upon a conviction after an appeal with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the Legislature considered this, the appropriate penalty for the offence. Certainly it cannot be said that the offence is aggravated by the accused having claimed a trial by jury. For what then is the additional penalty of eighty dollars, or the additional imprisonment for thirty days inflicted. If the offence remains the same, and the offender has done nothing but claim an appeal, in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right. Here also it is manifest that this right is not secured by the Constitution, but is wholly under the control of the Legislative power, if it can annex penalties to the exercise of the right.

These proceedings are clearly criminal in their nature. Their object is to inflict upon the person fine or imprisonment, and at the same time to adjudicate a forfeiture of the liquors. The process, and the judicial action under it, are directed both against the offender and his property. It is true the warrant does not require the officer to arrest any one, but only to seize and hold the property, and summon the owner or keeper, if known to him. But the arrest of property, to compel an appearance, is a known and effectual mode of proceeding against the owner of that property. Indeed all mesne process, both civil and criminal, which results in giving bail for an appearance, is only a mode of binding a certain amount of property

to a forfeiture on non-appearance. And when this law provides that the property is to be seized and detained and adjudged forfeited, if the owner or keeper fail to appear, and if he do appear that he shall be fined, or imprisoned, if found guilty, it has brought into action a criminal process both against the owner and his property. That spirituous or intoxicating liquors are still property, notwithstanding this act, is certain. The act nowhere declares the contrary, and it recognizes them as property, by providing for the appointment of public agents to buy and sell them, by expressly declaring that they may lawfully be held by chemists and others, and by not interfering with the title to them, under any circumstances, unless they are held in some town in the State for sale within that town. Indeed the very terms employed to describe the judgment to be entered by the justice of the peace, "they shall be adjudged forfeited," "and the owner shall pay a fine, &c." are applicable only to property, and clearly imply that there is deemed to be some title to be divested, something for such a judgment to operate upon, and something which, until forfeiture, had an owner.

This being a criminal prosecution, directed against person and property, having for its end both fine or imprisonment and forfeiture, it becomes necessary to compare the law, authorizing this prosecution, with another requirement of the 10th section of the 1st article of the Constitution of the State already quoted. The accused is "to be informed of the nature and cause of the accusation." This act does not require that any particular person should be charged, and in the case at bar the complaint charges no one. It merely sets forth that the complainants have reason to believe, and do believe, that spirituous or intoxicating liquors are kept, or deposited in several buildings which are mentioned,

or in the yards or cellars thereto belonging, and are intended for sale in the City of Providence, by a person not authorized to sell the same. Whether these particular liquors, or others seized at the same time and claimed by different persons, were referred to, whether the plaintiff who owned these liquors, or some other person in whose care they were left had this unlawful intent, is not stated or shown by the complaint. There being no accusation whatever against the plaintiff, how can he be said to be informed of its nature and cause. When the Constitution requires that the accused should be informed of the nature and cause of the accusation, it clearly implies that there is to be an accusation against him. An accusation against another, or against no one in particular, is not such an accusation as will satisfy this clause of the Constitution. It stands in the same article which demands a conformity to "the law of the land," that is due process of law, and should be interpreted as requiring that certainty which the common law has deemed essential to the protection of the accused. Certainty in respect to the person charged, is not the least essential particular to which the constitutional requisition extends. Sanford *vs.* Nichols et. al. 13 Mass. R. 286; Read *vs.* Rice, 2 J. J. Marsh, R. 45; Com'th *vs.* Davis, 11, Pick. R. 432; Com'th *vs.* Phillips 16 Pick. R. 211. If the complaint had charged the owner of particular liquors, so described as to be capable of being distinguished from all others, with an unlawful intent to sell them, perhaps this might be sufficient; though when it is borne in mind that this is a proceeding *in personam* as well as *in rem*, such a mode of presentment would be novel, especially as applied to a case in which the unlawful intent of a particular person is the substance of the offence. But here it does

not appear the owner was intended to be charged. The complaint alleges only that some person has this unlawful intent; but whether the owner, or some person to whom he had confided the possession, or a mere wrong doer, who had the possession, does not appear. Nor is there any description of the property, capable of distinguishing it from all other of like kind, and consequently of identifying the owner, if he should appear, as the person intended to be charged. The only description given is, that the property is liquors, spirituous or intoxicating, and that they are in one or all of three storehouses mentioned in the complaint, or in the cellars or yards belonging thereto. If it should turn out, as it did in this case, that more than one person had, or claimed to have such liquors, in one of those places, how is the accusation to be treated, and which claimant is to be selected as the one to be tried, and who is to make the selection; or under a complaint charging a person, to the complainants unknown, with a criminal intent, is a trial to be had of all claimants who may appear, however numerous they may be. The complainants having sworn that some one person is believed by them to be guilty, is the justice to go on and try all comers, till he finds some one guilty, and there stop, and discharge the rest, or proceed and convict two or three or any other number, if he find evidence enough, under a complaint against one only.

But this is by no means the only difficulty. The accused has an absolute right to a trial by jury. He has also a right to be so charged, that when that trial takes place, the jury shall pass upon the whole charge, so far as it involves matter of fact, and under the direction of the court, shall apply the law to all mixed questions of law and fact.

Now if the owner of liquors seized, reach a jury trial by an appeal, and the quantity of liquors seized exceed five gallons, the court is required to adjudge him "a common seller of intoxicating liquors," and he is to be punished accordingly. But the complaint does not charge him with being such a common seller, nor with having and intending to sell over five gallons, and no such fact is required to be, or can be put to the jury to be tried. Yet upon this fact, the judgment that he is guilty of a distinct offence, and the higher punishment appropriate to that offence, are rested. So that he is to be convicted of this higher offence without being charged with it, and without a trial by jury of one of the facts essential to constitute it.

It is urged however, that nevertheless this may be a valid proceeding against the property although the court could not thus convict the person. If this were simply a proceeding to forfeit property, it would nevertheless be a criminal prosecution within the meaning of this clause in the constitution, and the owner would be entitled to a trial by jury, and to have the accusation, relied upon to work the forfeiture, set forth substantially in accordance with the rules of the common law, so that he could discern its nature and cause. And I should more than doubt, whether a complaint, stating that only some liquors were in one or all of several buildings mentioned, and were intended by some person to be sold, would be sufficient. Suppose it is all admitted, *non constat* that the liquors seized are those referred to, or that their owner or any person to whom he had entrusted the possession, had any unlawful intent. It may be so, but it also may not be so; and a criminal charge, not only according to the rules of common law, but from the nature of the thing, should at least contain enough to

show, that if true, the appropriate punishment should be inflicted. Yet here, all that the complaint avers may be true, and yet the property of the plaintiff never held for sale in Providence, by him or his agent. It is to be borne in mind that this complaint is not merely the ground for issuing a warrant of search, and for the arrest and detention of the property, but it is the sole basis for judicial action afterwards. It is the only presentment of the offence. It is only the accusation which is to be tried, and therefore if the proceeding was to result only in a forfeiture of property, I should still consider the complaint as so deficient in the requisite certainty as to be bad for that cause.

But it is not possible thus to separate the proceedings, under this act, against the property, from the proceedings against the person, on appeal. The court is to order the property to be destroyed only in the event, "if the final decision shall be against the appellant." If there is no accusation upon which the appellant can lawfully be tried there can be no final decision against him, and the property cannot be destroyed.

When this writ of replevin was served, this property was held under an order of forfeiture which was invalid for two reasons: First; because there was no sufficient complaint; and secondly, because the plaintiff was deprived of his property by a criminal prosecution, in which he neither had, nor could have, a trial by jury, without submitting to conditions which the Legislature had no constitutional power to impose.

In general, a judicial act is not void, but voidable only, and therefore it is necessary to consider whether this order comes within that class of acts which are voidable only by some appropriate legal proceeding in the same case, or was absolutely void.

An order made by a Justice of the Peace concerning a matter not within his jurisdiction is void, and he, and all ministerial officers who execute that order, are trespassers. Wise *vs.* Withers, 3 Cranch 331: Cowp. 140: 7 B. & C. 536: 5 M. & S. 314: 11 Con. 95: 7 Wend. 200.

Such an order confers no authority to detain property, and is not a defence to an action of replevin by its owner. The enquiry therefore is, whether the magistrate had jurisdiction to make this order, and I am of opinion that he had not.

It has already been stated that this is a criminal prosecution. So far as this law attempts to confer jurisdiction upon Justices of the Peace to inflict fine and forfeiture, a trial by jury being at the same time denied unless the accused should comply with conditions to which he is not bound to submit, it is in conflict with the constitution, and is wholly inoperative.

The Legislature may confer on Justices of the Peace power to punish offences, but it must be so done as to preserve unimpaired the right of trial by jury, otherwise the whole proceeding is void, *ab initio.* The Constitution declares that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." The act now under consideration provides that the right shall not be enjoyed in all criminal prosecutions, but, under this act, only in those cases in which security shall be given to pay all fines and costs.

It is not practicable to consider the grant of jurisdiction to the justice valid, and the condition imposed on the exercise of the right of appeal void; because an appeal, in a criminal case, can exist only by force of a statute; and if the statute has given it only on certain conditions, the magistrate must execute his judgment, and

cannot allow the appeal, and the appellate Court cannot entertain it, unless those conditions are complied with. In substance, it is a grant of final jurisdiction to a Justice of the Peace in all cases in which such security is not given; and this is such a criminal jurisdiction as cannot be created under the Constitution of Rhode-Island.

I am of opinion, also, that the complaint in this case was so defective as to render all proceedings under it void. Here also the rule is, that if the process, though erroneous, is voidable only, it must be avoided by some proper legal proceedings, and while it stands they who act under it are not trespassers. But this is not an authorised legal procceding in which an error has occurred. The complaint is in the form required by the act. The difficulty is, that the act has authorized a criminal prosecution founded on a complaint which is not "due process of law." This act, so far as it authorizes such a prosecution, being in conflict with the Constitution, is inoperative, and it seems to be a necessary conclusion, that it confers no jurisdiction to receive and proceed upon such a complaint.

This may be illustrated by supposing a law authorizing a criminal prosecution without any complaint. In such case there could be no doubt that the whole proceeding would be absolutely void. I think it would be difficult to make a sound distinction between no complaint, and one which does not satisfy this requisition of the Constitution, which therefore is no legal complaint, and is not "due process of law" within the definition by Lord Coke of the words "law of the land" in *Magna Charta.*

It has long been settled (Martin *vs.* Marshall, Hob. 63,) that the magistrate must not only have a jurisdic-

tion of the subject matter, but of the process. And if the law conferring jurisdiction is fatally defective, as respects the process, which is the foundation of the jurisdiction, the jurisdiction does not exist. Grunder *vs.* Raymond et al. 1 Con. R. 40.

For both these reasons, I am of opinion that the proceedings before the Court of Magistrates were inoperative to divest the owner of this property of his legal rights, and consequently neither the taking nor detention are justified by the avowry.

Several other questions have been argued at the bar in this case, but I do not find it necessary to consider them. They involve important rights under the constitution and laws of the State. If any case should come here for judgment, requiring their decision, I shall pass upon them. This case is determined without doing so.

My opinion is, that there should be a judgment for the plaintiff, upon the demurrer, and if he claims damages for the taking and detention their amount must be assessed by a jury.

Pitman, District Judge, said he fully concurred in the opinion of Mr. Justice Curtis, and added:

The law in question was no doubt intended by many good men to promote the welfare of the community, but if this good cannot be accomplished except by the sacrifice of those principles which are so essential to secure our rights and liberties, we cannot hope for security because we are under a popular government. The despotism of *numbers* is quite as much to be dreaded as the despotism of *one*.

It is not lawful to do evil that good may come, and (if I may be ere allowed to say so) it is not *expedient*.

If good men disregard the vital principles of the Constitution, how can they expect that bad men are to be controlled by law.

There are other features of this law, which struck me at the hearing as a violation of the constitutional rights of the citizen.

The right of trial by jury, affected as it is by the conditions and obstructions which are annexed to the claim of this right by other sections, by the 9th section is rendered of less value to the accused, not only by declaring that no person engaged in the traffic of selling liquors contrary to this act "shall be competent to sit upon any jury in any case arising under this act," but by the mode of ascertaining the fact. The Constitution provides that "no man in a court of common law shall be compelled to give evidence criminating himself." Art. 1. Sec. 13.

This law authorizes the Court to inquire of the juror who may be challenged on this account: it is true, the law says "he may decline to answer," but what then? Is the fact to be proved by other evidence? No, his silence is considered as sufficient proof, and he is excluded accordingly. He is therefore compelled to answer if he does not wish to be excluded as unworthy to sit as a juror or does not wish to be considered as concerned in a traffic which may be considered as infamous.

The maxim of the common law recognized by the Constitution, is, that every man is to be presumed innocent until he is proved to be guilty.

The whole spirit of this law, appears to me to be at variance with the rights of property as well as person.

The Legislature has no right, by an act, to confiscate the property of the citizen; it may be forfeited for a violation of law, but this must be done without affecting the

rights of the owner thereof to a jury trial. But the object of this law does not appear to be so much "for the suppression of drinking houses and tippling shops," as its title would seem to import, as for the destruction of intoxicating liquors—because they may be injurious to the community. But those who drafted the law no doubt knew that this could not be done without making compensation to the owner thereof, as the Constitution of Rhode-Island and most of the other State Constitutions provide that private property cannot be taken for public use without just compensation. To evade this provision it is made criminal to have this kind of property, not merely in "drinking houses and tippling shops," but " in any store, shop, warehouse, or other building," &c. (sec. 11) with intent to sell the same, and by what manner of process and how it is to be destroyed we have seen,—evidently with a view to evade the trial by jury. Such an evasion is as illegal as a denial of this right, and if such a law is to be justified it can only be by adding another provision by which the owner shall be compensated for the destruction of his property.

Lord Coke in his commentary upon the 29th ch. of Magna Charta, says (2 Inst. 48) " 5, No man destroyed, &c."

" Every oppression against law, by color of any usurped authority is a kind of destruction, for, *quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud :* and it is the worst oppression, that is done by colour of justice."

In page 51, he says *:*

" Against this ancient and fundamental law (referring to Magna Charta) and in the face thereof, I find an act of parliament made (11 H. 7, cap. 3,) that as well justices of assize as justices of peace (without any finding or present-

ment by the verdict of twelve men) upon a bare information for the King before them made should have full power and authority by their discretions to hear and determine all offences, and contempts committed, or done, by any person, or persons against the form, ordinance, and effect of any statute made, and not repealed, &c. By colour of which act shaking this fundamental law, it is not credible what horrible oppressions, and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson, Knight, and Edm. Dudley, being justices of peace throughout England; and upon this unjust and injurious act (as commonly in like cases it falleth out) a new office was erected and they made masters of the King's forfeitures."

"But at the Parliament holden in the first year of H. 8, this act of 11 H. 7, is recited and made void and repealed, and the reason thereof is yielded, for that by force of the said act it was manifestly known, that many sinister, and crafty, feigned, and forged informations, had been pursued against divers of the King's subjects to their great damage and wrongful vexation; and the ill-success hereof, and the fearful ends of these two oppressors should deter others from committing the like, and should admonish parliaments, that instead of this ordinary and precious trial *per legem terræ*, they bring not in absolute and partial trials by discretion."

Judgment was then entered for the Plaintiff by order of Court, with one dollar damages by agreement of parties.

Extracts *from the Constitution of the State of Rhode-Island.*

Article I. Section 5. Every person within this State ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.

Sec. 6. The right of the people to be secure in their persons, papers, and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched, and the persons or things to be seized.

Sec. 10. (See page 40.)

Sec. 13. No man in a court of common law shall be compelled to give evidence criminating himself.

Sec. 14. (See page 45.)

Sec. 15. (See page 40.)

Sec. 16. Private property shall not be taken for public uses, without just compensation.

Extracts *from "An Act for the suppression of Drinking Houses and Tippling Shops."*

Sec. 2. The town Council of any town may, and the mayor and aldermen of any city shall, annually on the Monday next following the annual election of town and city officers in any town or city, or as soon thereafter as may be convenient, appoint some one or two suitable person or persons as the agent or agents of said town or city, to sell at some central or convenient place or places within said town or city, spirits, wines, or other intoxicating liquors, to be used for medicinal and mechanical purposes only; and said agent or agents shall receive such compensation for his or their services, and shall in the sale of such liquors, conform to such rules and regulations, as the town council or mayor and aldermen, as aforesaid, shall prescribe. Any such agent, appointed as aforesaid, shall hold his situation for one year, unless sooner removed by the board from which he received his appointment, as he may be at any time, at the pleasure of said board: and in case of a vacancy in said appointment by such removal, or otherwise, said board may appoint some other person to such agency for the remainder of the year.

Sec. 8. No person shall be allowed to be a manufacturer of any spirituous or intoxicating liquors, or to be a common seller thereof, without being duly appointed as aforesaid, on pain of forfeiting on the first conviction, the sum of one hundred dollars and costs of prosecution and conviction, and in default of the payment thereof, the person so convicted shall be imprisoned sixty days in the county jail of the same county in which the offence was committed; and on the second conviction, the person so convicted shall forfeit and pay the sum of two hundred dollars and costs of prosecution and conviction, and in default of payment, shall be imprisoned four months in said county jail; and on the third and every subsequent conviction, he shall forfeit and pay the sum of two hundred dollars and costs of prosecution and conviction, and shall

be imprisoned four months in said county jail: said penalties to be recovered before any court of competent jurisdiction, by indictment in the county where incurred, one half of said forfeiture to and for the use of the town or city in which the offence shall have been committed, and the other half thereof to and for the use of the State, but nothing in this act contained, shall be construed to prohibit the manufacture of cider, or the sale thereof in quantities not less than five gallons, or the manufacture of alcohol for exportation or to be sold to or through, and only to or through the agents appointed under the second section of this act.

SEC. 9. No person engaged in the unlawful traffic in intoxicating liquors shall be competent to sit upon any jury, in any case arising under this act; and when any juror shall be challenged for such cause, the court shall enquire of the juror so challenged; and no answer which he shall make shall be used against him in any cause arising under this act, but if he shall answer falsely, he shall be incapable of serving on any jury in this State; but he may decline to answer, in which case, he shall not be allowed to sit as juror in the trial of any case arising under this act, during the term of the Court for which he was drawn.

SEC. 11. If any three persons, voters in the town or city where the complaint shall be made, shall, before any justice of the peace, or court exercising the jurisdiction of a justice of the peace, in said town or city, make complaint under oath or affirmation, that they have reason to believe, and do believe that spirituous or intoxicating liquors are kept or deposited, and intended for sale, by any person not authorized to sell the same, in said city or town, under the provisions of this act, in any store, shop, warehouse or other building, vessel, craft or place, in said city or town, or upon any of the waters of Narragansett Bay, or any other public waters of this State, said justice or court shall issue a warrant of search, directed to the sheriff, his deputy, or to either of the town sergeants or constables in the county in which said city or town is, who shall proceed to search the premises described in said warrant, and if any spirituous or intoxicating liquors are found therein, he shall seize the same, and convey them to some proper place of security, where he shall keep them until final action is had thereon; but, no dwelling house, in which or in part of which, a shop is not kept, shall be searched, unless at least one of said complainants shall testify to some act of sale of intoxicating liquors therein, by the occupant thereof or by his consent or permission, within at least one month of the time of making said complaint; and the owner or keeper of said liquors, seized as aforesaid, if he shall be known to the officer seizing the same, shall be summoned to appear forthwith before the justice, or at the next regular session of the court upon whose warrant the liquors were seized: and if he fails to appear, or unless he can show by satisfactory proof, that said liquors are of foreign production, that they have been imported under the laws of the United States and in accordance therewith, that they are contained in the original packages in which they were imported, and in quantities not less than the laws of the United States, prescribe, they shall be adjudged forfeited, and shall be destroyed by authority of the written order to that effect, of said justice or court, and in his presence, or in the presence of some person appointed by said justice or court, to witness the destruction thereof, and who shall join with the officer, by whom they shall have been destroyed, in attesting that fact upon the back of the order by authority of which it was done; and the owner or keeper of such liquors shall pay a fine of twenty dollars, or stand committed for thirty days in default of payment, if in the opinion of such justice or court, said liquors shall have been kept so deposited for the purposes of sale, contrary to the provisions of this act. And if the owner or possessor of any liquors seized in pursuance of this section, shall set up the claim, that they have been regularly imported under the laws of the United States, and that they are contained in the original packages, the custom house certifi-

cate of importation and proof of marks on the casks or packages corresponding thereto, shall not be received as conclusive evidence, that the liquors contained in said packages are those actually imported therein.

Sec. 12. If the owner, keeper or possessor, of liquors, seized under the provisions of this act, shall be unknown to the officer seizing the same, said liquors shall not be condemned and destroyed until they shall have been advertised, with the number and description of the packages, as near as may be, for two weeks, by posting up a written description of the same in some public place, in order that, if such liquors are actually the property of any city or town in the State, and were so at the time of the seizure, purchased for sale by the agent of said city or town, for medicinal and mechanical purposes only, in pursuance of the provisions of this act, they may not be destroyed; but upon satisfactory proof of such ownership, within said two weeks, before the justice or court by whose authority said liquors were seized, said justice or court shall deliver to the agent of said city or town, an order to the officer having said liquors in custody, whereupon said officer shall deliver them to said agent, taking his receipt therefor, on the back of said order, which shall be returned to said justice or court.

Sec. 13. If any person claiming any liquors seized as aforesaid, shall appeal from the judgment or order of any justice or court, by whose authority the seizure was made, to the Court of Common Pleas, next to be holden in the same county after ten days, before his appeal shall be allowed, he shall be required to give recognizance in a sum not less than two hundred dollars, with good and sufficient sureties, conditioned, that he will file his reasons of appeal, together with a copy of the whole case in the court appealed to, on or before the second day of the next term thereof, that he will appear before said court, and there prosecute his appeal with effect, and abide and perform the order or sentence of said court in said case, and pay all fines and costs that may be awarded against him; which recognizance such justice or court shall forthwith certify to said Court of Common Pleas; and he shall also, at the time of taking such appeal, pay to said justice or court all costs that may have accrued upon such complaint and warrant, to be taxed against him by such justice or court; and in the case of any such appeal, where the quantity of liquors so seized shall exceed five gallons, if the final decision shall be against the appellant, that such liquors were intended by him for sale, contrary to the provisions of this act, he shall be adjudged by the court a common seller of intoxicating liquors, and shall be subject to the penalties provided in section eight of this act; and said liquors shall be destroyed as provided in section eleven of this act, upon the order of the court, in which the case shall be finally disposed of, in such manner as said court shall direct; but nothing in this act contained, shall be construed to prevent any chemist, artist, or manufacturer, in whose art or trade they may be necessary, from keeping at his place of business, such reasonable and proper quantity of distilled liquors, as he may have occasion to use in his art or trade, but not for sale.